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BIENNIAL REPORT

of the

ATTORNEY GENERAL

STATE OF FLORIDA

From January 1, 1965, through December 31, 1966

EARL FAIRCLOTH
Attorney General

Tallahassee, Florida
1967

TABLE OF CONTENTS

	Page
Table of Contents	ii
Letter of Transmittal	iii
Attorneys General of Florida since 1845	iv
Attorney General's Office	v
In Memoriam Honorable Ralph E. Odum	vi, vii
Editorial Staff	viii
Explanation	viii

OPINIONS

Opinions 1965	1
Opinions 1966	216

REPORTS AND STATISTICS

1965, 1966 Constitutional Amendments	405
Constitutional and Statutory duties of Attorney General	414
Statutory Revision Department	419
Cases Handled in Attorney General's Office	422

INDEXES

Omitted Opinions by number and subject matter 1965-1966	426
General Index	427
Citator to Florida Statutes, Constitution and Sessions Laws	465

STATE OF FLORIDA

OFFICE OF THE

ATTORNEY GENERAL

TALLAHASSEE

EARL FAIRCLOTH
ATTORNEY GENERAL

January 3, 1967

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY
HONORABLE CLAUDE R. KIRK, JR.
GOVERNOR OF FLORIDA

SIR:

I have the honor of submitting to you my Biennial Report of the two preceding years from January 1, 1965 through December 31, 1966. This report is submitted as required by the constitutional mandate directing each officer of the Executive Department to make a full report of the official acts of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the legislature or whenever the Governor shall require a report.

This report includes opinions of general interest rendered during two calendar years, a listing of former Attorneys General, constitutional amendments adopted by the legislature in 1965 and ratified at the general election in 1965 and 1966, the constitutional and statutory duties of the Attorney General and the personnel of my office during the past two years. Opinions are numbered numerically as released and identified by the year and number beginning with opinion No. 1 as "065-1."

A table of statute and constitution sections cited in the opinions and an alphabetical subject index may be found in the last portion of the report.

Respectfully submitted,

EARL FAIRCLOTH
ATTORNEY GENERAL

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WILLIAM B. LAMAR	1889-1903
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W. H. ELLIS	1904-1909
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VAN C. SWEARINGEN	1917-1921
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FRED H. DAVIS	1927-1931
CARY D. LANDIS	1931-1938
GEORGE COUPER GIBBS	1938-1941
J. TOM WATSON	1941-1949
RICHARD W. ERVIN	1949-1964
JAMES W. KYNES	1964-1964
EARL FAIRCLOTH	1965-

ATTORNEY GENERAL'S OFFICE

The Capitol — 222-3440

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Attorney General

WILLIAM W. BAILEY
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In Memoriam

RALPH EMERSON ODUM

RALPH EMERSON ODUM

1913-1966

"Heaven is not reached at a single bound;
But we build the ladder by which we rise
From the lowly earth to the vaulted skies,
And we mount to its summit round by round." . . . JOSIAH HOLLAND

Ralph Emerson Odum was born in Waycross, Georgia on December 11, 1913, and passed away suddenly on June 5, 1966, while on assignment with the Attorney General's office. He is survived by his wife Christiana R. Odum, and one son, Captain Michael R. R. Odum, who is now serving in the United States Army in Viet Nam. He was the son of L. W. Odum and Myrtle Sauls Odum.

Ralph was reared and educated in Lakeland, Florida, and was graduated from Florida Southern College. He subsequently obtained his law degree from the John B. Stetson University in 1939, and became a member of The Florida and Federal Bars and of the local Bar in Tallahassee.

He distinguished himself as an Assistant to the Attorney General of Florida where he served from 1949 until his death in 1966. He was also legal advisor to the State Board of Education handling general litigation and preparing bond issues for various counties in the state, and for many years furnished legal advice to The Board of Control. He spent his energies in improving law enforcement and in protecting personal rights of all Florida citizens without fear of criticism.

He was an active member of the Presbyterian church, a member of the Kiwanis Club and the International Christian Leadership Organization. He was a veteran of World War II where he served with distinction as a Lieutenant Junior Grade in the United States Navy.

His integrity, ability, sincerity and warmth both in public and private life earned the respect and friendship of all who came in contact with him. His passing leaves a void in the hearts of all who knew him.

Ralph Emerson Odum will be remembered for his long and fruitful public career in behalf of the State of Florida and the Attorney General's office.

And those that were good shall be happy; they shall sit in a golden chair:
They shall splash at a ten-league canvas with brushes of comet's hair;
They shall find real saints to draw from—Magdalene, Peter and Paul;
They shall work for an age at a sitting and never be tired at all. RUDYARD KIPLING



In Memoriam

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BIENNIAL REPORT

EDITORIAL STAFF

CHARLES TOM HENDERSON *Director of Statutory Revision and Bill Drafting, Assistant Attorney General*

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LILYAN D. GARRISON *Copy Editor*

EXPLANATION

This report contains copies of a majority of the opinions rendered by this office during the past two years. The opinions that are omitted are of a purely local nature or application. It has been necessary to eliminate some material in the interest of economy since the number of opinions issued has increased beyond all expectations. A copy of any opinion omitted from this report is on file in this office. For omitted opinions by number and subject matter, see index and table of omitted opinions listed immediately preceding the alphabetical index.

BIENNIAL REPORT

of the

ATTORNEY GENERAL

State of Florida

January 1, 1965, through December 31, 1966

065-1—January 4, 1965

REGULATION OF TRADE AND COMMERCE

RETAIL INSTALLMENT ACT—OFFICIAL FEES CHARGEABLE

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Under §520.34(1)(d), F. S., may "official fees" be charged to a purchaser where the official act in respect of which the fee arises does not occur?

At the time the above question was posed by Mr. Lewis, we were provided with a letter addressed to his office from a retail installment vendor seemingly taking the position that "official fees" may be included in a retail installment sales contract and the amount thereof charged to the buyer even though the actual expense was not incurred and as supporting rationale therefor, it is contended that the practice is permissible inasmuch as there is nothing in the act expressly requiring a retail installment contract to be recorded. While we agree that there is nothing in this particular regulatory statute requiring a retail installment contract to be recorded, we cannot agree that it therefore follows that "official fees" in an amount equal to what it would cost to record such contract can nonetheless be executed.

Chapter 520, Part II, F. S., is a legislative enactment passed in 1959, the obvious and manifest purpose of which is to regulate persons engaged in certain retail installment sales transactions. The act provides for licenses for those so engaged; designates the state comptroller as the official to administer the act; provides for denial, suspension, or revocation of licenses; and, further, specifies certain regulatory provisions concerning this class of activities which are required to be abided by, not the least of which provisions is contained in §520.34, F. S., designating certain minimal information which must be contained and expressed in each retail installment contract at the time the contract is entered into, including the express requirement that there be printed on each such contract in type not less than ten point in size, a notice to the buyer not to sign the contract before it is read or if it contains any blank spaces and advising the buyer that he is entitled to an exact

copy of the paper signed by him; and, further, in the event the buyer determines to prepay the full amount due under certain conditions, he may obtain a partial refund of the time price differential. The time price differential referred to in the act is popularly referred to by the public as finance charges, carrying charges, and sometimes interest. Said section further provides that the contracts shall set forth the cash price of the goods or services provided, the amount of the buyer's down payment, if any, the difference between such two items, and in §520.34(1)(d), F. S.:

> The amount, *if any*, of official fees and the cost, *if any*, to the buyer of any insurance (specifying the types of coverage) the buyer has agreed to procure if the seller has agreed to purchase the insurance and charge the buyer for the cost thereof. (Emphasis supplied.)

and other information, including the time price differential (carrying or finance charge) being assessed against the buyer in connection with the transaction. The statute, of course, provides a maximum rate of such time price differential which may be charged and further provides a not uncomplicated formula whereunder the amount of rebate to which the purchaser is entitled in the event of prepayment may be calculated.

In concluding that the proper interpretation to be given §520.34-(1)(d), F. S., leads us to answer the propounded question in the negative, we cannot overlook the circumstance that the statutory authorization for charging a buyer "official fees" is preceded by what we take to be an admonition contained in the two words "if any" appearing in the provision relating to such official fees. Said subsection also authorizes the installment vendor to charge the buyer with the cost of any insurance that the buyer has agreed to procure and again includes the limitational language "if any" as respects such insurance.

Thus, in view of the limitative language used by the legislature by inserting the phrase "if any," it is my view that official fees may be charged only when the official acts in respect of which the payment of fees necessarily arises, such as recordation of contracts, actually occur.

While the specific statute in question has not to our knowledge been heretofore construed in a reported case, we do find our court confronted with a situation similar in principle, though not in fact. In Stoutamire v. North Fla. Loan Assoc., 11 So.2d 570, the Sup. Ct. found that a pretended attorney's fee was in reality a bonus paid to the lender's agent and attorney in fact rather than a legitimate expense of the loan, the validity of which was therein being determined.

In Mindlin v. Davis, 74 So.2d 789, the court in a usury case involving the construction of §687.03, F. S., placing a limitation upon the amount of interest which may be exacted in a loan transaction, held that fees exacted from a borrower for the examination of title of the loan security and handling the closing of a loan were legitimate items which the lender may pass on to the borrower inasmuch as such items involved an actual expense to the lender. So it is then that statutes providing a schedule of maximum charges in a finance transaction which also provide for charges over and above the maximum rate in connection with official fees or insurance charges should be strictly construed so that the additional items of charges should not be imposed upon the public unless the actual expense therefor is incurred by the vendor.

In view of the above and foregoing statutory and decisional citations, your question is answered in the negative.

065-2—January 15, 1965

LEGISLATION

SPECIAL CENSUS ENUMERATION FOR MUNICIPALITY OF TALLAHASSEE—EFFECT ON POPULATION ACTS, COUNTY, MUNICIPAL

To: Wilson Carraway, President, Florida Senate, Tallahassee

QUESTION:

Will the special census enumeration recently made by the federal census bureau in the city of Tallahassee affect any population acts (general laws of limited application) presently applicable to Leon county?

Section 5, Art. VII, State Const., 26 FSA, provides, among other things, that:

> The last preceding decennial federal census beginning with the federal census of 1950 shall also be the state census and shall control in all population acts and constitutional apportionments, unless otherwise ordered by the legislature. (Amended by general election on Nov. 7, 1950).

Pursuant to this authorization the legislature has provided that:

> 11.031 *Official census.*—
>
> * * * * *
>
> (2) No special county or district census shall be effective for any purposes other than to ascertain the population for the purpose of interpreting an existing law relating to additional judges of the circuit court and additional county judges, but no existing population or apportionment act shall be affected by a special census.

Significantly, the limitation of the effectiveness of a special census, supra, expressly refers to a special census of a county or district; hence, inapplicable to a special census conducted within the limits of a municipal corporation.

Consequently, I am of the opinion that general laws of limited application, population acts applicable to Leon county, would not be affected by the recent special census enumeration made by the federal census bureau within the municipal limits of the city of Tallahassee.

It is my further opinion that general laws of limited application, population acts, if any, applicable to a city having a population of 58,022 would become applicable to the city of Tallahassee as a result of the special census. Population acts, if any, applicable to the city of Tallahassee prior to the special census which had a population classification of a number of inhabitants not including a population of 58,022 would no longer be applicable to the city of Tallahassee.

065-3—January 28, 1965

RETIREMENT

STATE AND COUNTY OFFICERS AND EMPLOYEES—INAPPLICABILITY OF CH. 122, F. S., TO CIVIL AIR PATROL EMPLOYEES

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is the effect, if any, of the expenditure of the funds appropriated to the Florida wing of the civil air patrol, a federal

corporation, upon the status of its employees, as well as on the status of the title of properties purchased in whole or in part with such funds?

Section 1, Ch. 63-548, (§282.011(16), F. S.) appropriated a total sum of $40,000 from the general revenue fund:

> For the purpose of the acquisition, installation, conditioning and maintenance of equipment and facilities for the Florida wing headquarters and its subordinate units of the civil air patrol; provided, however, that no part of the appropriation shall be expended for the purchase of aircraft, uniforms, or personal effects of members of the civil air patrol or for compensation or salary to such members; provided, further, however, that the wing commander of the Florida wing of the civil air patrol may employ administrative help which may be paid from such appropriation.

The civil air patrol was incorporated and declared to be a body corporate, under the name of "The Civil Air Patrol," by the Congress of the U. S. July 1, 1946, by the act of said date (60 Stat. 346 and 347), which act also appears as §§201-208, title 36, U.S.C. The purpose of this corporation, as expressed by the said act of July 1, 1946, was:

> To encourage and aid American citizens in the contribution of their efforts, service, and resources in the development of aviation and in the maintenance of air supremacy, and to encourage and develop by example the voluntary contribution of private citizens to the public welfare,

as well as:

> To provide aviation education and training especially to its senior and cadet members; to encourage and foster civil aviation in local communities and to provide an organization of private citizens with adequate facilities to assist in meeting local and national emergencies.

Such corporations, among other powers, are vested with power to acquire, hold, mortgage and dispose of real and personal property as may be necessary for its corporate purposes; to accept gifts, legacies, and devises which will further the corporate purposes. It is stated in §9441, title 10, U.S.C., that the civil air patrol is "a volunteer civil auxiliary of the Air Force," and that the secretary of the Air Force may "furnish such quantities of fuel and lubricants to the Civil Air Patrol as are needed to carry out any mission assigned to it by the Air Force." This shows a close relation between the U. S. air force and the civil air patrol.

Other federal corporations include the American national red cross, boy scouts of America, girl scouts of America, American legion, united Spanish war veterans, marine corps league, disabled American veterans, reserve officers association, national academy of sciences, national safety council, boys clubs of America, and others mentioned in title 36, U.S.C. Many of these federal corporations were designed to work in cooperation with the federal government or one or more of its agencies. The civil air patrol appears to have been designed to work in cooperation with the U. S. air force; it is referred to as "a volunteer civil auxiliary of the Air Force," in §9441, title 10, U.S.C.

The funds appropriated by Ch. 63-548, were appropriated to the Florida wing of the civil air patrol for the uses and purposes mentioned in said Ch. 63-548, to be expended by the "wing commander of the Florida Wing of the Civil Air Patrol" who is bonded in accordance with §2 of said Ch. 63-548 to insure the proper expenditure of the said funds. Title to the fund, when paid over to the civil air patrol in ac-

cordance with said Ch. 63-548 becomes the property of the civil air patrol, as a gift or donation to be expended in conformity with said Ch. 63-548. Said Ch. 63-548 establishes no state agency nor does it make the civil air patrol a state agency for the purpose of expending the appropriated funds or for the employment of personnel. The civil air patrol has been described as a benevolent corporation. (Hooten v. Civil Air Patrol, DC Wis. 161 Fed. Supp. 478, text 481; Pearl v. United States, CCA Okla., 230 Fed.2d 243, text 245). The civil air patrol appears to have the general status of a nonprofit benevolent corporation acting as a civil auxiliary for the U. S. air force, but is not in law an agency of the U. S.

Employees of the civil air patrol who are paid from funds appropriated to the use of the civil air patrol by Ch. 63-548, are employees of the said civil air patrol and not of the state or one of its agencies, and are paid from funds of the said civil air patrol, although such funds may have been derived from the funds appropriated by said Ch. 63-548. Such employees are not within the purview of Ch. 122, F. S., and are not state or county employees within the purview of said Ch. 122, F. S.

Equipment and other property purchased by the civil air patrol with funds derived from the appropriation made by Ch. 63-548, became property of the civil air patrol, a corporation, not of the state, or agency, commission, board, etc., thereof.

Although the civil air patrol was incorporated by congress, it does not appear to have been established as a governmental department or agency of the U. S. such as would entitle it to tax exemption, absent a declaration of tax exemption by congress (Union Pacific Railroad Company v. Peniston, 85 U. S. 5, 21 L. Ed. 787, text 792 and 793). Although workmen compensation contributions are not, strictly speaking, taxes, they are nevertheless enforced contributions. The reported cases are in conflict as to the application of workmen compensation statutes to churches, the red cross, the salvation army, and other eleemosynary groups and corporations, absent an express statutory exemption (1 Larson, Workmen Compensation, 748 et seq., §50.42; 3 Schneider, Workmen Compensation, Perm. Ed., 58-67, §§791 and 792; Bradbury's Workmen Compensation Law, 201-202, §§17 and 18). Liability seems to depend largely upon the provisions of the applicable statute. Florida workmen compensation statutes are administered by the Florida industrial commission, whose offices are in the Caldwell building, Tallahassee; it is suggested that a ruling be requested of the said industrial commission.

065-4—January 28, 1965

EDUCATION

CONSTRUCTION OF STATUTES AND REGULATIONS OF STATE BOARD OF EDUCATION PROVIDING FOR REVOCATION OF TEACHING CERTIFICATES; CHEATING ON EXAMINATIONS

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Under the provisions of §130-4.36(6) of state board of education regulations and §231.28, F. S., does the state board of education have authority to revoke the teaching certificate of a person who has stated explicitly that he cheated on the examination either by copying from another person's paper or other-

wise or who has admitted having another person take the examination for him?

2. In those cases in which serious doubt is expressed in a report from the educational testing service as to the validity of a test score does the state board of education under the provisions of §130-4.36(5)(d) of state board of education regulations have authority to refuse to accept such test score when filed?

Section 231.28, F. S., provides:

Revocation of certificates.—The state board of education shall have authority to suspend the teaching certificate of any person for one year, thereby denying him the right to teach for that period of time, after which the holder may return to teaching as provided in subsection (6); or, revoke the teaching certificate of any person, thereby denying him the right to teach for a period of time not to exceed ten years, with reinstatement subject to provisions of subsection (6); or, revoke permanently the teaching certificate of any person, provided:

(1) It can be shown that such person obtained the teaching certificate by fraudulent means, or has proved to be incompetent to teach or to perform his duties as an employee of the public school system, or to teach in or to operate a private school, or has been guilty of gross immorality or an act involving moral turpitude, or has had his certificate revoked in another state, or has been convicted of a misdemeanor, felony, or any other criminal charge, other than a minor traffic violation, or upon investigation has been found guilty of personal conduct which seriously reduces his effectiveness as an employee of the county board, or has otherwise violated the provisions of law, the penalty for which is the revocation of the teaching certificate, or has refused to comply with the regulations of the state board of education or the board of public instruction in the county in which he is employed.

State board of education regulation 130-4.36(6) provides:

Cheating. Upon presentation of reasonable and satisfactory evidence that a person holding a teaching certificate is guilty of cheating on one of the required examinations for teacher certification or continuing contract purposes shall be sufficient grounds for the revocation or suspension of his teaching certificate by the state board of education, provided that such person shall be entitled to a hearing as provided by law and state board of education regulations.

It is my opinion that cheating on an examination as you have described is conduct within the purview of §231.28, F. S., which sets forth the grounds for suspension or revocation.

Question 1 is answered in the affirmative, provided that the teacher is given an opportunity for a hearing if he so desires and at said hearing it is established by prima facie showing that the confession was voluntary. "When this is accomplished, accused who denies it was voluntary must then go forward with evidence to support his position." Reddish v. State of Florida, Case No. 31,796, Sup. Ct., filed Oct. 7, 1964.

As to question 2, state board regulation 130-4.36(5)(d) provides:

Scores. Any score presented to the state department of education or a county board of public instruction *shall be properly authenticated by responsible officials of the agency administering the examination.* . . . When the result of an examination

is to be used in accordance with the provisions of section 231.16(2) and 231.36, Florida Statutes, the person taking the examination shall arrange with the examining agency to furnish authenticated scores directly to the state department of education, or to a county board of public instruction, or both, as required. (Emphasis supplied.)

As provided above, the state board of education must rely upon the testing service to authenticate scores of teachers.

Assuming that the testing service has authenticated the score, a mere subsequent expression of serious doubt by the testing service as to the validity of the score would not in my opinion invalidate the score for certification purposes. In this event it would be incumbent upon the testing service to withdraw its authentication for good cause before the state board could properly suspend or revoke the teacher's certificate.

065-5—January 29, 1965

PUBLIC OFFICERS

USE OF FACSIMILE SIGNATURES

To: Arch Livingston, Motor Vehicle Commissioner, Tallahassee

QUESTION:

Where any document filed with the motor vehicle commissioner (Ch. 319, F. S.) is required under the law to be sworn to before a notary public or other officer empowered to administer oaths, may the commissioner accept such document when the signature of the attesting officer appears to be a facsimile signature made by the use of a rubber stamp in lieu of the officer's manual signature?

The use of facsimile signatures in Florida is recognized by statute in certain specific instances. Section 116.34, F. S., is presently the only Florida statute providing for the use of facsimile signatures. This particular statute (§116.34(3)(a)-(c), F. S.), provides for the use of a facsimile signature in the following instances:

(3) USE OF FACSIMILE SIGNATURE.—Any authorized officer, after filing with the secretary of state his manual signature certified by him under oath, may execute or cause to be executed with a facsimile signature in lieu of his manual signature:

(a) Any public security or instrument of conveyance, provided that at least one signature required or permitted to be placed thereon shall be manually subscribed.

(b) Any instrument of payment.

(c) Any official order, proclamation or resolution; provided, however, that this shall not apply to the signing of legislative bills or veto messages.

Unless the use of a facsimile signature can fall within the above cited categories, it is unauthorized by law. Applying the above comments to Ch. 319, F. S., it is my opinion that the motor vehicle commissioner should not accept such documents where the signature of the attesting officer appears to be a facsimile signature made by the use of a rubber stamp in lieu of the officer's manual signature.

065-6—January 29, 1965

PUBLIC MONEYS

ENDORSEMENT OF CHECKS AND OTHER OBLIGATIONS PAYABLE TO DECEASED STATE OFFICER

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Is the comptroller authorized to process the payments and deposit the same to the state when the checks and other obligations for payment are made payable to a named state officer now deceased?

2. Is the comptroller authorized to process checks and other obligations made payable to "J. Edwin Larson, State Treasurer" through the validating machine which states on the validating plate, "Pay to the order of the State Treasurer, or any bank, banker or trust company for deposit only," and would this endorsement affect the validity of the checks in connection with depositing same in the state treasury?

3. Would all other state agencies, when receiving checks payable as stated above, be authorized to deposit said checks by similar endorsement as stated in question 2?

Under §20, Art. IV, State Const., "the Governor shall be assisted by administrative officers as follows: A Secretary of State, Attorney General, Comptroller, Treasurer, Superintendent of Public Instruction and Commissioner of Agriculture . . . ," which officers are elective officers as is the governor himself. Under §24, Art. IV, State Const.:

> The Treasurer shall receive and keep all funds, bonds and other securities, in such manner as shall be prescribed by law, and shall disburse no funds, nor issue bonds or other securities, except upon the order of the Comptroller, contersigned by the Governor in such manner as shall be prescribed by law.

The funds coming into the state treasury are funds of the state and its agencies, in the custody of the state treasurer. Checks and other obligations payable to the person holding the office of state treasurer, "State Treasurer," "as State Treasurer," or words of similar meaning, are in effect checks and obligations payable to the state. Bank deposits made under like or similar terms are in law deposits to the account of the state.

In their advisory opinion of Sept. 29, 1953 (67 So.2d 413) the justices of the Sup. Ct. of Fla., advised the acting governor that, "As to those warrants prepared prior to the death of Governor Dan T. McCarty, but bearing date subsequent thereto and which have been heretofore signed by the Comptroller and countersigned in the usual manner 'Dan McCarty, Governor,' you may make an executive proclamation, adopting, confirming and ratifying said countersignatures aforesaid as your own . . ." causing such checks to be delivered in the usual manner to the payees. We see no legal objection to the treasurer lately appointed following a similar plan and advising those making endorsements of checks and other instruments with validating machines bearing plates, "J. Edwin Larson, State Treasurer," that he confirms, adopts and ratifies endorsements so made as his own until new plates bearing his name have been made and are available for use on the validating machines.

When the provisions of the last above paragraph are complied with by the succeeding state treasurer each of the above questions will be deemed answered in the affirmative.

065-7—January 29, 1965

TAXATION

MUNICIPAL LICENSE TAXES ON NONRESIDENT BOATS

To: Randolph Hodges, Director, Florida Board of Conservation, Tallahassee

QUESTION:

May incorporated municipalities of this state impose their municipal license taxes on boats of nonresidents navigating in the navigable waters within their corporate limits?

Section 5, Art. IX, State Const., provides in part that "the legislature may also provide for levying . . . a tax on licenses." Under this provision, license taxes, including license taxes by municipalities will be upheld if reasonable, and not unjustly discriminatory, arbitrary, whimsical, irrational, grossly oppressive, plainly unequal or contrary to common right. (Gray v. Central Florida Lumber Co., 104 Fla. 446, 140 So. 320, text 325). Under this constitutional provision municipal corporations may, by ordinance adopted according to governing law, authorize a municipality to impose license taxes although inconsistent with existing statutes covering the particular subject. (Jacksonville v. Bowden, 67 Fla. 191, 64 So. 769, text 772).

Section 371.0104, F. S., drived from §7, Ch. 63-550, imposes license taxes on noncommercial boats in the amounts therein specified, which license tax is divided between the state and the county of the situs of the boat licensed in the amounts specified in said §371.0104. It is provided in §371.0102, F. S., that nothing in said section "shall be construed to prohibit any municipality that expends money for the patrol, regulation and maintenance of lakes, rivers or waters in such municipality from regulating such boats and vessels *resident in such municipalities* and charging a license fee therefor. All moneys received from such fee shall be expended for the patrol, regulation and maintenance of the lakes, rivers and waters of such municipality." (Emphasis supplied.) These license taxes imposed by the municipality appear to be in the nature of regulatory fees earmarked to be used only for the patrol, regulation and maintenance of the lakes, rivers and waters of the municipality, and not available for general municipal purposes.

Section 371.0100, F. S., relating to the registration of boats and vessels, does not appear to provide for the imposition of a general municipal license tax on boats and vessels, as is imposed by §371.0104, F. S., for state and county use. It is noted that §§371.0100-371.0108, F. S., treat boats and vessels as "motor vehicles" within the purview of §13, Art. IX, State Const., not subject to ad valorem taxes but subject to a license tax for their operation. Section 320.24, F. S., relating to motor vehicles within the purview of Ch. 320, F. S., makes it "unlawful for any county or municipality to collect any license or registration fee on any motor-driven vehicle, trailer, semi-trailer or motorcycle sidecar in this state." We find no like or similar provision in §§371.0100-371.-0108, F. S., prohibiting county and municipal license taxes against boats and vessels; as a matter of fact, §§371.0102 and 371.0104, F. S., make

provision for state and county license taxes against boats and vessels, as well as a limited municipal excise tax.

Many legislative charters of municipalities in this state, or special or local acts, provide for the imposition of licenses and license taxes on businesses, professions and occupations, as well as license taxes, amusement taxes, admission taxes, and other excise and license taxes "without regard to the amount of a state tax, if any is so imposed," and whether or not there be a state or county tax imposed on the same subject. Whether or not a license or other excise tax may be imposed by a particular municipality upon any subject of a license tax, where the municipality is operating under a legislative charter or local or special act, may be determined only from an examination of its charter act and other applicable local and special laws relating to such municipality.

From the above and foregoing statutes, laws and observations, the above question should be answered in the negative as to municipalities incorporated under the general statutes and laws of the state; however, the answer to the said above question, as to municipal corporations with legislative charters or local or special laws relating to taxation, will depend largely upon the applicable provisions of their said charters or other local or special laws. No general answer, applicable to all incorporated municipalities, may be given to the said question, but answers must be determined from applicable provisions in their legislative charters or special or local taxing and licensing laws.

065-8—February 1, 1965

ROADS AND BRIDGES

SPECIAL ROAD AND BRIDGE DISTRICTS—EXPENDITURE OF COUNTY ROAD FUNDS

To: Ralph B. Wilson, County Attorney, Fort Pierce

QUESTIONS:

1. Where the bonds issued to raise funds for the construction of roads in a special road and bridge district have been retired, must the road and bridge taxes raised by county taxation on properties within the district be expended only on the district roads and not otherwise?

2. Where the width of the roads, length of bridges, and construction materials to be used in the construction of roads and bridges were set out in the original district plans and specifications, may they now be departed from in their maintenance and reconstruction?

You state in your request for opinion that you are specifically concerned with special road and bridge district No. 5 in St. Lucie county, established and created in 1925, with the construction of the district roads about the same time. You further state that the said district was created and established and the bonds issued pursuant to §§1647-1666, R.G.S., 1920. Said sections appear to have been compiled from Ch. 6208, acts of 1911, as amended prior to the adoption of the said R.G.S. and brought into the Revised Statutes, 1920, as said §§1647-1666, which sections, together with amendments and extensions, were brought into the Florida Statutes, 1941, as Ch. 140, F. S., which chapter, also together with amendments and extensions and existing provisions relating to roads and bridges, were revised and reenacted by Ch. 29965, acts of 1955, replacing Chs. 139-141, 341, 343 and 348 and other statutes

relating to roads and bridges, said Ch. 29965 becoming Chs. 334-339, F. S. These statutes span a period of many years, going back to 1911.

Doubtless the Florida legislature, in enacting and revising the said statutes, intended legislation progressive in nature abreast with changes in highway and road construction, maintenance and upkeep. You state that the petition for the establishment and creation of the district in 1925 made reference to roads 9 feet in width. It does not appear that the above statutes require the maintenance of such roads at only 9 feet if highway and road construction in the county and state, due to progress in road and highway construction, now exceeds such width. This same rule would appear to relate to highway materials and construction. Said statutes should be construed in the light of changes made in road and highway construction over the years since the enactment of said Ch. 6208, acts of 1911, the adoption of the R.G.S., 1920, and the adoption of the several Florida Statutes.

Section 16, Ch. 6208, acts of 1911, as well as §1662, R.G.S., and §140.18, F. S., prior to Ch. 29965, acts of 1955, provided that: "any special road and bridge district created under authority of this chapter shall be entitled to receive for the repair and maintenance of the roads and bridges in said district, *its due proportion of the county tax levied and collected upon the taxable property of the county for general road purposes. . . .*" (Emphasis supplied.) This provision now appears as a part of §336.57, F. S., which section further provides that: "The special tax provided for herein shall be levied and collected on the taxable property in the special district, only for such repair and maintenance of the roads and bridges in the special district that cannot be paid from its portion of the general county road tax." Similar provisions were contained in said §16, Ch. 6208, acts of 1911, §1662, R.G.S., 1920, and §140.18, F. S.

The provision in §336.57, F. S., that special road and bridge districts "shall be entitled to receive for the repair and maintenance of the roads and bridges in such district, *its due proportion* of the county tax levied and collected upon the taxable property of the county for general road purposes," (Emphasis supplied.) contemplates a division of county-wide tax funds between the county and the taxing district. Doubtless this division is based upon the amount of roads and bridges maintained by the county in proportion to those to be maintained within the taxing district. It may be that the district owns and maintains certain roads located within the district and the county owns and maintains others within the same district. The district would retain the taxes raised by the district for its own road and bridge maintenance purposes.

In the light of the above and foregoing, county-wide taxes for road and bridge maintenance may be expended on either district or county roads and bridges within the district, while taxes raised by county taxation on properties entirely within the district shall be used for maintenance of roads and bridges which cannot otherwise be provided for from the general county road tax.

Question 2 is answered in the affirmative.

065-9—February 3, 1965

CRIMINAL PROCEDURE

DEFENDANTS—TRANSFER FOR SAFEKEEPING—AUTHORITY OF TRIAL JUDGE

To: L. L. Wainwright, Director, Division of Corrections, Tallahassee

QUESTION:

Where a defendant in a criminal case is confined in a county jail but has not been convicted and sentenced to the state prison, and where the trial court makes an order directing that such defendant be held in the state prison for safekeeping, should the division of corrections accept custody of such defendant under such order, for safekeeping at said prison? If not, how should the division handle the situation when such a defendant is presented at the state prison with a certified copy of a court order directing the division to hold him for safekeeping?

It is my opinion that the state prison and the other state correctional institutions are places in which to confine persons convicted, sentenced and committed to serve state prison sentences, not places for the safekeeping of defendants who have not been thus convicted, sentenced and committed.

Section 944.02(5), F. S., defines "prisoner" for the purposes of Ch. 944, as follows:

> *'Prisoner' means any person convicted and sentenced by the courts and committed* to the state prison, prison farm, or penitentiary, or to the custody of the division, as provided by law. (Emphasis supplied.)

The purpose of the state prison is stated in §944.03(3), F. S., as follows:

> (3) The purpose of this institution shall be to provide custody, care, protection, industrial vocational and other training, and reformatory help *for* the *prisoners* confined therein. This institution shall be the primary institution for adult male offenders, of the Florida correctional system. This institution is and shall be composed of such units for the detention of such classes of prisoners as the board and the director shall provide. (Emphasis supplied.)

and state correctional institutions are defined by §944.02(6), F. S., as follows:

> 'State correctional institution' means any prison, road camp, prison industry, prison forestry camp, or any prison camp or prison farm or other correctional facility, temporary or permanent, *in which prisoners are housed, worked or maintained,* under the custody and jurisdiction of the division. (Emphasis supplied.)

These statutes considered, it appears to be clear that the purpose of establishing the state prison is to furnish a place in which to keep "prisoners," that is, persons who have been convicted, sentenced and committed to serve state prison sentences. It is equally clear from said statutory provisions that the legislature did not establish the state prison for the purpose of furnishing a place of safekeeping for persons who have not been thus convicted, sentenced and committed.

Therefore, it is my opinion that a trial court has no authority to order that a person be held in the state prison for safekeeping when

such person has not been convicted, sentenced and committed thereto; and that if such a person should be presented to the state prison with a certified copy of an order that he be held there for safekeeping, it would be lawful and appropriate to decline to receive such person into the state prison for such safekeeping.

My view on this matter is strengthened by the fact that the legislature has enacted a statute providing for the transfer of a county prisoner to another county jail for safekeeping, viz., §950.02(3), F. S., which, incidentally, provides that: ". . . the county to which the prisoner is sent or any officer thereof is not required to incur or pay any expense or charge of maintaining such prisoner," which provision leaves the county from which the prisoner is transferred with the responsibility of paying for the cost of maintaining him in the county to which he is transferred. If the legislature had intended to authorize the transfer of a county prisoner to the state prison for safekeeping, it would have been a simple matter for it to insert in said statute apt words to accomplish that intent, and the fact that it did not do so indicates that it had no intention of authorizing county prisoners to be transferred to the state prison for safekeeping. Your questions are answered accordingly.

065-10—February 5, 1965

PUBLIC PRINTING

CLASS "A" AND CLASS "B" PRINTING RELATING TO LEGISLATURE

To: Edwin G. Fraser, Secretary of the Senate, Tallahassee

QUESTIONS:

1. What is embraced in class "A" printing, defined in §283.04, F. S., as "all printing required for the legislative department of the state government?"

2. What is embraced, insofar as the legislature is concerned, in class "B" printing, defined in §283.04, F. S., as "all of the printing required for the state not included in class "A" printing?"

Section 283.04, F. S., divides all public printing of the state into 2 classes, including: "Class A, which shall embrace all printing *required* for the legislative department of the state government, and *all* of the printing required to be done for the Supreme Court; and Class B, which shall embrace all of the printing required for the state not included in Class A." (Emphasis supplied.) Section 283.05, F. S., requires that contracts for class A printing be awarded to the lowest responsible bidder therefor by the board of commissioners of state institutions after the giving of a 30 days' notice "calling for bids on Class A printing." Section 283.06, F. S., provides that: "Each award of contract, or contracts, for printing shall be made separate and upon a unit bid for each item to be contracted for by the Board of Commissioners of State Institutions."

To ascertain required printing for both the legislature and the Sup. Ct. necessitates an examination of the constitution and laws of the state.

Prior to 1947 the Sup. Ct. opinions were considered class A printing and bids were awarded by the board of commissioners of state institutions. At no time was any other printing by the Sup. Ct. ever considered other than class B printing under §283.04, F. S.

Section 12, Art. III, State Const., requires that, "Each house shall keep *a journal* of its own proceedings, *which shall be published*, and the yeas and nays of the members of either house on any question shall, at the desire of any five members present, be entered on the journal." (Emphasis supplied.) Instances are pointed out in other sections of the constitution where journal entries are required to reflect specified proceedings. Section 11, Art. IV, State Consts. of 1838 and 1861, and §10, Art. IV, State Const. 1865, contained similar provisions for the maintaining of legislative journals. These legislative journals reflect, as well as preserve an account of, legislative action, and publication is required.

Section 6, Art. XVI, of the constitution referring to required printing by the legislature states as follows:

> The legislature shall provide for *the speedy publication* and distribution of all laws it may enact. Decisions of the Supreme Court and all laws and judicial decisions shall be free for publication by any person. But no judgment of the Supreme Court shall take effect until the decision of the Court in such case shall be filed with the clerk of said Court.

This section was adopted in 1896 and has not been amended since its enactment.

From an examination of the constitution and the statutes the required (mandatory) legislative printing is restricted to the printing of the daily journals of the house and senate, the printing and binding of the bound volume of such journals, the printing of the daily calendars of the senate and house (a part of the journal process), the printing and binding of the general laws of Florida, and the printing and binding of the special acts of Florida. This seems to cover the printing required for the legislature referred to in the statutes as class "A" printing. Research fails to reveal any mandatory required legislative printing in the constitution or statutes added since 1896.

The pamphlet laws under statutory law enacted in 1927 are required specifically to be printed by the secretary of state (§283.17, F. S.) and paid for by an appropriation from the general fund of the state (§283.19). The pamphlet laws are not intended to be a part of the class A printing referred to in §§283.04 and 283.05, F. S., which were enacted in 1887, 40 years prior to the 1927 act.

All other printing for the legislature, its members, officers and personnel, reasonably necessary for the efficient operation of the legislature is Class "B" printing within §283.04, F. S. Such class "B" printing is further regulated by §283.10 as amended in 1959 and classified by §287.011(2), F. S., as "commodities" within the purview of Ch. 287, F. S., and subject to the rules and regulations of the state purchasing commission, which must be complied with when purchasing class "B" printing. Said §287.011(2), provides in part that "bids shall be required on Class 'B' printing."

From the above and foregoing the above-stated questions are answered as follows:

1. Class "A" required legislative printing includes the printing of the daily journal, the printing and binding of the bound journal, the printing of the calendars for each house, the printing and binding of the general laws, and the printing and binding of the special and local acts.

2. All other printing for the legislature, its members, officers, personnel, etc., in connection with the operation and business of the Florida legislature, is class "B" printing, and subject to the provisions of

§283.10, F. S., and the rules and regulations of the state purchasing commission which must be conformed to when purchasing such printing.

3. The secretary of state, and not the board of commissioners of state institutions, is responsible for the printing and distribution of pamphlet laws through an appropriation from the general fund of the state.

Any opinions rendered heretofore concerning the right of the board of commissioners of state institutions to determine contract specifications beyond statutory requirements to accept combination bids, and provide penalties for failure to perform are reconfirmed.

Prior opinions relating to a determination of class A and class B printing wherever in conflict with this opinion are superseded and null.

065-11—February 9, 1965

TAXATION

REAL PROPERTY—LANDS PRODUCING OIL—OIL-PRODUCING EQUIPMENT

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Does the presence of a producing oil or gas well upon a given parcel of land add any value to such lands for purposes of taxation?

2. Does the presence of a producing oil or gas well upon a given parcel of land add any value to adjacent lands, except as may be provided for under §193.221, F. S.?

3. When is oil and gas well drilling or producing equipment used in this state, subject to taxation as tangible personal property?

Section 1, Art. IX, State Const., provides, insofar as here material, that "the legislature shall provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure *a just valuation* of all property, both real and personal, excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes." (Emphasis supplied.) Section 16, Art. XVI, State Const., provides, insofar as here material, that "the property of all corporations . . . whether heretofore or hereafter incorporated, shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." These constitutional provisions have been "construed as a limitation upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself." (L. Maxcy, Inc., v. Federal Land Bank, 111 Fla. 116, 150 So. 248, text 250; State v. Doss, 146 Fla. 752, 2 So.2d 303, text 304). It is provided in and by §192.01, F. S., that "unless expressly exempted from taxation, all real and personal property in this state . . . shall be subject to taxation in the manner provided by law." The value of all real and personal property in this state, for purposes of ad valorem taxation, should be determined and fixed in the manner provided for and contemplated by §193.021, F. S., 1963.

It is provided in §193.221, F. S., that subsurface rights (mineral, oil, gas and other subsurface right in or to real property in this state) "shall be taken and treated as an interest in real property subject to

taxation separate and apart from the fee or ownership of the fee or other interest in the fee . . . subject to separate taxation when returned for taxation by the owner of the fee, or other interest in the fee, or the owner or claimant of such subsurface rights or interests . . ." This statute does not necessarily apply to lands and interests in lands upon which producing oil or gas wells are located, and was doubtless intended to apply to lands encumbered by oil, gas and mineral leases or other interests. It is provided in and by §193.221(2), F. S., that: "such subsurface rights, when returned for taxation, as aforesaid, shall be assessed on the basis of just value, as required by Section 1, Article IX, of the State Constitution, which valuation, when combined with the value of the remaining surface and undisposed of subsurface interests, shall not exceed the full just value of the fee title of the lands involved, including such subsurface rights." There are other applicable provisions of this section of the statutes not mentioned here, because such provisions are not deemed important under the first question as posed above.

Chapter 211, F. S., was designed as a regulation, in part, and a tax on the production of oil and gas in this state. This tax on production is imposed by §211.02, F. S., and is in the nature of an excise tax and is measured by the value of the oil and gas produced in this state. Under §211.13, F. S., no other excise or license tax may be imposed on the production of oil and gas, in this state, however, it is further provided by said §211.13, F. S., that: "the several tax assessors of this state and of the cities therein, when assessing the value of any land for ad valorem taxes, shall not increase the value thereof by reason that there may be oil or gas under the surface of such land, in as much as it is impossible under known valuation methods to accurately ascertain the true value of oil and gas in place and taxation thereof is more certainly accomplished after its capture or severance from the earth or water. The value of the land for ad valorem tax purposes shall not be increased by reason of the location thereon of any producing oil or gas equipment or machinery used in or around any oil or gas well and actually used in the operation thereof and no ad valorem tax shall be imposed upon such producing equipment and machinery." It appears to have been the intention of the legislature when it enacted what is now Ch. 211, F. S., to impose the excise tax provided in §211.02, F. S., upon the production of oil and gas in this state, as a substitute for and in lieu of an ad valorem tax upon the increased value of real property by reason of the presence of oil or gas in or under the said real property. In effect these statutes were designed to accomplish the legal severance of the oil and gas in or under lands in Florida from the remaining interests or estates in the said lands and substitute an excise tax on the severance from said lands of such oil and gas in lieu of ad valorem taxes, but at the same time retaining the imposition of ad valorem taxes on all the interests in such lands except the said oil and gas interests. (See Cassady v. Consolidated Naval Stores Co., Fla., 119 So. 35.)

The prospecting for oil and gas in this state as well as the production thereof is subject to the provisions of Ch. 377, F. S., and the rules and regulations of the state board of conservation, made and provided under and pursuant to said Ch. 377, F. S., which include regulations providing for drilling units, the location of oil and gas wells, limitations on the amount of oil and gas that may be taken.

Under these regulations all the owners of lands within a drilling unit share in proportion to their ownerships in the oil and gas taken from a drilling unit, although no oil or gas well may be drilled or located in their properties. These rules and regulations were designed to

prevent one landowner or his lessee sinking an oil or gas well on such owner's land, which covers only a part of the oil or gas pool, and draining all the oil and gas out from under the lands of the said owner and lessee but from under the lands of other owners over the same oil or gas pool. The excise taxes imposed under Ch. 211, F. S., are imposed upon the oil and gas produced from the oil or gas wells and this without regard to the landownerships from under which the said oil and gas may have been drawn in the production thereof.

Section 193.221, F. S., and Chs. 211 and 377, F. S., should and must be considered together in order to ascertain and determine the operations of each, as well as their fields of operation. Chapters 211 and 377, F. S., relate primarily to the prospecting for and production of oil and gas in Florida; §193.221, F. S., relates primarily to oil, gas and other subsurface rights, which have been by contract severed from the title to real property and constitute, at least for some purposes, a separate estate in such real property. The field of operation of said §193.221, F. S., seems to be that time between the creation of such interests or estates and the time oil or gas has been discovered under said lands and production is or might be commenced.

The measure of valuation of "mineral, oil, gas and other subsurface rights in or to real property in this state" for purposes of ad valorem taxation would seem to be the "just value" of such "mineral, oil, gas and other subsurface rights" determined largely from their market value if placed on the market for sale by a person willing to sell but not forced to sell to another person willing to buy but not forced to buy. Such valuation of such subsurface rights, together with the rights and interests in the real estate not transferred, should not exceed the "just value" of the real property itself as determined under and pursuant to §193.021, F. S. Upon the discovery of oil or gas, or both, under real property in this state, taxation of such oil and gas rights should be according to Ch. 211, F. S., above-mentioned and discussed and the provisions of §193.221, F. S., are no longer applicable to the oil and gas rights, but would be applicable to other mineral interests not within the purview of said Ch. 211, F. S. The presence of a producing well within a drilling unit of land, which usually is made up of adjacent properties, would seem to remove the lands within such drilling unit from the operation of §193.221, F. S., under the provisions of Ch. 211, F. S.

The third question poses the proposition: Is the taxation of tangible personal properties used in drilling for oil and gas authorized, which would seem to cover the time of the drilling operations prior to the actual bringing in of an oil or gas well or the discovery of oil and gas in paying quantities in the well. Machinery and equipment "used in and around any oil or gas well and actually used in the operation thereof," which may be referred to as producing equipment, is not subject to ad valorem taxation. (§211.13, F. S.) Under this section machinery and equipment used in connection with the pumping or production of oil or gas from a well is not subject to ad valorem taxation and the presence of such machinery upon the lands upon which the well is located will not add any value thereto for purposes of ad valorem taxation.

In Arundel Corp. v. Sproul, 136 Fla. 167, 186 So. 679, the said corporation had brought the seagoing dredge Hallandale into Florida, probably from Maryland, around Jan. 1, 1933, where it was used for dredging the intercoastal waterway between Jacksonville and Miami until around May 1934, after which it was moved into the Everglades where it was used for the purpose of dredging canals for the Everglades drainage district, it having been located in Palm Beach county, on

Jan. 1, 1935, when it was assessed for ad valorem taxes for the tax year 1935, and taxes in the sum of about $23,750 as tangible personal property having a tax situs in Florida. It was the contention of the owners that the dredge was temporarily in Florida and had acquired no tax situs in said state; with this the Sup. Ct. disagreed and upheld the tax so imposed. In National Dredging Co. v. State, 99 Ala. 12 So. 720, a dredge was brought into Alabama in 1891 and used in said state until July 1892; it having been assessed for taxes for the tax year 1892, this assessment was upheld. The question involved in these cases seems to have been whether or not the tangible personal property taxes had become blended with commerce and business of the state as to give them a tax situs in Florida. Although tangible personal property may be located in Florida on Jan. 1 of a tax year, it is taxable only if it has become blended with commerce or business of the state to such an extent as to say it has acquired a tax situs in Florida. The facts in each case seem to be the determining factor in determining tax situs.

The above-stated questions are answered as follows:

1. The presence of a producing oil or gas well upon a given parcel of real property, under the provisions of §211.13, F. S., adds no taxable value for purposes of ad valorem taxation to the said real property, an excise tax having been imposed in lieu thereof by said §211.13, F. S.

2. The presence of a producing gas or oil well on a parcel of land should not be deemed to add any value to lands adjacent to such producing property (see §211.13, F. S.) for the purposes of ad valorem taxation. Section 193.221, F. S., does not seem to have any application to lands producing oil or gas; its application being to lands prior to the production of oil or gas therefrom.

3. Oil drilling equipment, which is to be distinguished from the oil and gas producing equipment exempted from taxation by §211.13, F. S., after the same has acquired a tax situs in Florida, would seem to be tangible personal property within the purview of Ch. 200, F. S. Tangible personal property does not acquire a tax situs in Florida merely and only because located in Florida on January of a tax year, but must have acquired a tax situs in said county prior to said Jan. 1 of the tax year.

065-12—February 17, 1965

COUNTY HOSPITALS

SUWANNEE COUNTY HOSPITAL—CONTRIBUTIONS OF TAXES COLLECTED TO SERVICE FOR INDIGENT PROGRAM

To: Lois Johnson, Administrator, Suwannee County Hospital, Live Oak

QUESTION:

> **May the trustees of the Suwannee county hospital legally contribute moneys derived from millage assessed for the benefit of said hospital to the Florida state board of health as a contribution to the hospital service for the indigent under Ch. 401, F. S.?**

County hospitals are established either under the general laws (Ch. 155, F. S.) of the state or by special act. Suwannee county hospital was established by Ch. 23547, 1945, as amended by Ch. 30250, 1955. Consequently, the powers and duties that inure to the trustees of the Suwannee county hospital are those powers and duties which are set

out in its enabling act, and any other applicable statutes.

Section 3 of said act charges the board of county commissioners of Suwannee county, with the duty of providing revenue for the erection, building, equipping, and maintenance and operation of the Suwannee county hospital.

Section 4(a) allocates all race track funds in excess of $33,000 annually that may be received by Suwannee county from the state to the hospital for purposes of erecting, building, equipment, maintenance and operation. Therefore, to reallocate any portion of these funds to any purpose other than those set out above would be in clear derogation of legislative intent.

Section 4(b) of said act states that for the purposes of erecting, building, equipment, maintenance and operation of said hospital there is hereby appropriated to said hospital:

> All revenue or moneys which may be collected by the levy of an ad valorem tax of not more than five mills on the dollar of assessed valuation.

Section 5 states that said millage be known as the "hospital tax." Section 6 states that the Suwannee county hospital corporation is established and incorporated for public purposes, such purposes to "embrace the building and equipment, maintenance and operation of the public hospital at Live Oak." Furthermore, §6(e) states that the trustees of said corporation are to receive and disburse for hospital purposes as herein authorized all public moneys appropriated to and paid to the said Suwannee county hospital.

Consequently, as can be seen by the aforementioned sections of Ch. 23547, 1945, as amended by Ch. 30250, 1955, all of the funds which inure to the hospital do so for the purpose of erecting, building, equipping, maintenance and operation. Furthermore, the trustees of the hospital must certify the amount of millage to be levied for the "hospital tax" for the purpose of erecting, building, equipping, maintenance and operation.

Section 401.08(2), F. S., states that:

> Each board of county commissioners of this state is authorized and empowered to budget for and provide county funds as may be necessary to match, on a formula basis, the county's part of the cost of this program.

Section 401.11, F. S., in pertinent part states as follows:

> There shall be established in the state treasury an account or fund to be designated as the 'hospital service fund for the indigent' and all funds, from whatever source, appropriated or received for indigent hospital service shall be deposited into this fund and be expended by the board solely for the purposes set forth in this chapter, . . . any county may receive credit for direct expenditures made during a current year by the county to a hospital or hospitals when such expenditures can be shown to have been made for the care of 'medically indigent persons'
>
> . . .

As can be seen by §§401.08(2) and 401.11, F. S., it is contemplated that the flow of funds in pursuance to Ch. 401, hospital service for the indigent, F. S., is a flow from county sources to the hospitals participating in the indigent program. Consequently, where a county hospital appropriates funds directly to this program, it appears that such appropriation would be in violation of the intent of Ch. 401, F. S.

In light of the above provisions set forth in the charter of the Suwannee county hospital established by Ch. 23547, 1945, as amended by Ch. 30250, 1955, it is the opinion of this office that the trustees

of the Suwannee county hospital are apparently without authority to contribute money derived from millage assessed for the benefit of said hospital to the Florida state board of health as a contribution to the hospital service for the indigent under Ch. 401, F. S.

065-13—February 13, 1965

COUNTY BOARDS OF PUBLIC INSTRUCTION

TRAVEL EXPENSES ALLOWABLE FOR BOARD MEETINGS

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Is a member of the board of public instruction in the several counties of Florida entitled to receive travel from his place of residence to the county seat to attend regularly scheduled board meetings?

Section 230.201, F. S., provides:

Compensation of members of county board.—In addition to the salary provided in §145.041, each member of a county board shall be allowed from the county school fund reimbursement of traveling expenses as authorized in §112.061, provided, however, that any travel outside of the county shall also be governed by the rules and regulations of the state board.

Section 112.061, F. S., provides for per diem and travel expenses of public officers and employees, including county school officials. This act applies in the absence of specific exemptions by general law or conflicting provisions of special acts.

Section 112.061(4) provides: "the official headquarters of an officer or employee assigned to an office shall be the *city* or *town* in which the office is located." (Emphasis supplied.)

Section 112.061(7)(d) provides:

The use of privately-owned vehicles for official travel in lieu of public-owned vehicles or common carrier may be authorized by the agency head if a public-owned vehicle is not available. Whenever travel is by privately-owned vehicle, the traveler shall be entitled to a mileage allowance at a fixed rate not to exceed ten cents per mile or the common carrier fare for such travel, to be determined by the agency head. Reimbursement for expenditures related to the operation, maintenance, and ownership of a vehicle shall not be allowed when privately-owned vehicles are used on public business and reimbursement is made pursuant to this paragraph, except as provided in subsection (8) of this section.

All mileage shall be shown from point of origin to point of destination and when possible shall be computed on the basis of the current state road department map. Vicinity mileage necessary for conduct of official business is allowable but must be shown as a separate item on the expense voucher.

Subsection (10) paragraphs (a) and (b) provide:

(a) The state comptroller shall promulgate such rules and regulations and prescribe such forms as may be necessary to effectuate the purposes of this section.

(b) Each agency shall promulgate such additional rules and regulations not in conflict with the rules and regulations of

the state comptroller, as may be necessary to effectuate the purposes of this section. Such rules and regulations shall be recorded in the official minutes of the agency or maintained in a special file in the main office of the agency.

In accord with the above-cited statutory authority, it is my opinion that a county school board may by regulation authorize travel expense on a mileage basis not exceeding 10¢ a mile to board members incurred in attending official board meetings. School board members are required by law to reside in the district from which they are elected. In some counties these districts may be 50 miles or more from the county seat where official meetings are held. Since it is the duty of the board member to attend the meetings, it would appear reasonable and within the intent of the law to permit a fair reimbursement for such travel if the county board so desires and if such reimbursement is not in conflict with a special act.

Not unmindful of the limitations of §112.061(2), (k), (l) and (m), F. S., inferentially defining travel as absence from official headquarters, it is my view that the express provisions of §230.201, F. S., *supra*, were intended to operate as an exemption to said limitations and authorize reimbursement of travel expenses to members of a county school board in the amounts as provided in §112.061, F. S.

I am advised that the comptroller has not promulgated a regulation which would prohibit a local county school board from adopting a regulation authorizing travel reimbursement under these circumstances.

Subject to the above comment, your question is answered in the affirmative if the board on which he serves has adopted a regulation authorizing such reimbursement.

065-14—February 17, 1965

FLORIDA BOARD OF CONSERVATION

BEACHES AND SHORES— RIPARIAN RIGHTS IN COASTAL CONSTRUCTION

To: Randolph Hodges, Director, Board of Conservation, Tallahassee

QUESTION:

In requiring the artificial filling by sand material, between groins, what effect will this have upon the riparian ownership of the upland?

As I understand your question, you propose by regulation to require that the space between all groins, upon completion, must be artificially filled with suitable sand material and up to certain specifications. This would have the effect of pushing the high watermark seaward to the outer limits of such groins, which may extend from 20 to more than 100 feet perpendicular to the shoreline into the Atlantic or the gulf.

The bottoms of all tidal waters below the mean high waterline are the property of the state by right of sovereignty, and title to such lands is vested in the trustees of the internal improvement fund. Chapter 63-40, (amending §§370.01, 370.02, F. S.) places the responsibility for regulating coastal construction below the mean high waterline in the division of beaches and shores of the Florida board of conservation, which you direct.

The purpose of constructing groins, under a permit from your department, would be for the preserving of the shoreline and incidentally to protect the upland from erosion. Such installations are defensive in nature and are designed to protect the beach areas along our coastal

waters from being eroded by the natural forces of nature.

The legal principles having application to upland property bordering on navigable waters are to the effect that where the upland property is lost by reason of erosion, that is, the gradual and imperceptible wearing away by reason of the natural forces of nature, the boundary of the upland ownership changes and recedes commensurate with the effects of the erosion. Where there is a natural buildup as to these same types of land, described by the legal term of accretion, the upland owner benefits by reason of boundary change moving out into the navigable water. Thus, under gradual and almost imperceptible changes in the shoreline, the upland owner gains by accretion and loses by erosion.

If your division of beaches and shores should issue permits for the installation of coastal structures designed primarily for the purpose of adding to the upland property, then I think the trustees would feel obligated to register objection to any such project. If, however, the permit issued by the division of beaches and shores is designed primarily for the purpose of maintaining the status quo of the beach area or of protecting that which already is in existence, then I feel the trustees would be justified in granting approval to such project even though there might be some boundary changes by reason of the fact that the permit would require the applicant to fill the area between the groins with suitable sand material to give assurance for the success of the installation, even though the secondary effect would be to add such area to the use of the upland owner.

This question came up with regard to the use of public funds for the creation of land areas below the original high watermark when the city of Deerfield Beach applied for authority to create an erosion project by which a number of groins and other installations were to be projected into the Atlantic ocean below the mean high watermark, some of them in front of private property and some in front of public property. At that time, the trustees entered into an agreement with the city of Deerfield Beach in connection with a loan of trustees' funds to be used in the erosion control project, which contained a paragraph as hereinafter set forth that might have application to similar projects being processed by the division of beaches and shores, of the board of conservation:

> (6) That the rights of the Trustees and the riparian upland owners will not, by this agreement, be waived nor prejudiced in any respect as to any uplands artificially created upon lands now submerged, as the result of filling or beach nourishment operations under said contract or by the function of the groins to be modified and repaired under said contract. It is further agreed by the parties hereto that the Trustees in entering into this contract or agreement with the City of Deerfield Beach do not admit to any liability to the riparian owners in the area involved, whether classified as such prior to the erosion and/or avulsion herein sought to be restored and controlled, or considered as such riparian owners as of the date of this agreement.

By the above, the trustees attempted to retain in the public domain those areas created by the use of public funds and to set up at least some defense against the claims of riparian owners who might wish to capitalize on lands thus created in sovereignty waters by public funds.

The end result of such a requirement as you propose will be to add to and thus increase the upland areas of the riparian owner, thus, at least in theory, clouding the public's title to the submerged land so filled by artificial means between the groins. The trustees are empowered

in each case to make an independent appraisal of the factual situation and thus assemble facts on which the effect on the riparian rights of the upland owner can be determined.

Your question is answered accordingly.

065-15—February 17, 1965

COURTS

STATUS OF SPECIAL ASSISTANT PUBLIC DEFENDER

To: Joseph G. Spicola, Jr., Public Defender, Tampa

QUESTIONS:

1. Does the special assistant public defender authorized by §27.53(2), F. S., have an independent status or does he derive his status from the public defender and act as the agent of the public defender?

2. May such a special assistant public defender properly be appointed to represent a defendant whom the public defender cannot represent because of such a conflict of interest as is described in AGO 063-105, and, if he may be so appointed, can the trial judge award him a fee?

AS TO QUESTION 1:

Section 27.53(2), F. S., provides:

> (2) In addition, any member of the bar in good standing may register his or her availability with the public defender of each judicial circuit for acceptance of special assignments without salary to represent insolvent defendants. Such persons shall be listed and referred to as special assistant public defenders and may in the discretion of the trial judge be paid a fee; such fee shall be fixed by the trial judge and shall be paid in the same manner as counsel fees are paid in capital cases or as otherwise provided by law. In addition, defense counsel may be assigned and paid pursuant to any existing or future local act or general act of local application.

My construction of this statute is that it contemplates that the only way for a member of the bar to act as a special assistant public defender is for him to register his availability with the public defender for acceptance of special assignments to represent insolvent defendants and for the public defender to assign him to represent one or more such defendants. Moreover, the very name "special *assistant* public defender" denotes that he is the special assistant of the public defender and I regard an assistant to a public officer as being subject to the direction of such officer in the performance of his duties. (Emphasis supplied.)

Said statute considered, it is my opinion that a special assistant public defender has no independent status; that he derives his authority and status from and acts instead of and as the agent of the public defender; and that his acts in defending an insolvent defendant are, in legal effect, the acts of the public defender.

AS TO QUESTION 2:

Since this question involves a conflict of interest such as was described in AGO 063-105, I will briefly outline the facts dealt with in that opinion. Those facts were that 4 defendants were charged with robbery; that 2 of them pleaded not guilty; that 2 pleaded guilty and it appeared probable that they would turn state's evidence and testify against the 2 who had pleaded not guilty; and that if the public defender

were required to represent all 4 defendants, the advice which he might have to give to the 2 who had pleaded guilty might well operate to help convict the 2 who had pleaded not guilty.

I understand that the question now before me is as to whether a special assistant public defender might properly be appointed to represent a defendant whose interests were in conflict with those of another defendant in the same case whom the public defender represented.

It is my opinion that this question is properly answered in the negative. Because, as indicated above, a special assistant public defender is the assistant of the public defender and acts in his place and stead and as his agent, I consider that it would be improper for a special assistant public defender to represent a defendant in a criminal cause whose interests conflict with those of another defendant who is being represented by the public defender.

In the light of the views which I have expressed on this point, I think it unnecessary to discuss whether the trial judge could award a fee for a special assistant public defender in such a situation.

065-16—February 24, 1965

RETIREMENT FUNDS

APPROVED INVESTMENTS—STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT FUND

To: David V. Kerns, Director, Florida Legislative Council and Legislative Reference Bureau, Tallahassee

QUESTION:

May the Florida legislature, in the light of §10, Art. IX, State Const., authorize the investment of funds of the state and county officers and employees retirement system (Ch. 122, F. S.) in common stock, preferred or other interests in companies, associations or corporations?

Section 10, Art. IX, State Const., provides that "the credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation . . ." These provisions seem to have appeared in the State Const. as a part of the 1875 amendment of §7, Art. XII, State Const. of 1868. It was held in Herr v. St. Petersburg, Fla., 114 So.2d 171, text 173 and 174, that said §10, Art. IX, State Const., applied as well to public corporations as to private corporations. See also Holland v. State, 15 Fla. 455, text 535, to the same effect.

Although stock purchases by a county or a city from an individual, association or corporation, appear authorized from the opinions in State v. Dade County, Fla., 142 So.2d 79, and Brautigan v. White, Fla., 64 So.2d 781, it appears from such opinions that such stock purchases were not designed as an investment of public funds but as a means of obtaining or purchasing the title to real or tangible personal property owned by the corporations which had issued the said corporate stock. In State v. Key West, Fla., 14 So.2d 707, a purchase of a controlling interest in a power company through the purchase of corporate stock in the power company was held violative of said §10, Art. IX, State Const.

It is provided in §122.14, F. S., that "a board to consist of the governor, the state comptroller and the state treasurer, shall be authorized to invest" any funds of the state and county officers and employees

retirement system in the securities mentioned in said §122.14, and "in such other securities in which domestic life insurance companies are permitted" their funds in. It is provided in and by §625.0123, F. S., that "an insurer may invest in dividend-paying stocks, common or preferred, or any corporation created or existing under the laws of the United States or of any state."

This poses the question of whether funds of the state and county officers and employees retirement system of Florida (Ch. 122, F. S.) subject to investment under and pursuant to §122.14, F. S., when invested in stock issued by, or interests in, companies, corporations or associations, violates said §10, Art. IX, State Const., and affects the status of the funds of the said state and county officers and employees retirement system as state funds or funds of an agency, board, commission, etc., of the state.

In State v. Lee, 157 Fla. 62, 24 So.2d 798, the Sup. Ct. of Fla., remarked that retirement systems, like the former county officers and employees retirement system (former Ch. 134, F. S.) which was merged with the state officers and employees retirement system (former Ch. 121, F. S.) "have been generally upheld on the theory that the delayed payments are a part of the participant's compensation for services already performed and are not regarded as extra or increased compensation that would offend §11, Art. XVI, and similar provisions of the constitution." See also Voorhees v. Miami, 145 Fla. 402, 199 So. 313, text 316, and Retirement Board of Allegheny County v. McGovern, 316 Pa. 161, 174 A. 400, text 404 and 405.

Section 122.17, F. S., appropriates from the intangible personal property tax fund and other funds to the retirement trust fund "an amount equal to the total amount paid in the said fund by all participating officers or employees" of the state and counties, as matching funds. Retirement benefits payable to retired state and county officers and employees are payable from the said retirement trust fund as provided by §122.08, F. S. Although said funds above-mentioned form a trust fund from which retirement compensation is paid to retired state and county employees, they are not subject to general appropriation by the Florida legislature. Such fund is nevertheless a state fund, title to which is vested in the state earmarked for purposes of Ch. 122, F. S. The state, and not the members of the state and county officers and employees retirement system, controls and has title to the retirement trust fund provided for by §122.14, F. S.

Until the question of the status of the state and county officers and employees retirement fund, and its investment in stock and interests in corporations, companies and associations, is determined or clarified by the Florida appellate courts, the above question is answered in the negative so long as said §10, Art. IX, State Const., remains unchanged.

065-17—February 24, 1965

REGULATION OF PROFESSIONS AND VOCATIONS

BARBERS, OUT-OF-STATE—PRACTICE ON MILITARY BASES—TIME NOT APPLICABLE IN COMPLYING WITH §476.11(1)(b)1., 2., F. S.

To: James E. Burnette, Director, Florida Barbers' Sanitary Commission, Tallahassee

QUESTION:

May a person who has practiced barbering at any military installation in this state count the time practicing barbering at

such installation toward satisfying the alternative 5-year practice requirement set forth in §476.11(1)(b)2., F. S., available to out-of-state persons who are not licensed?

Section 476.11, F. S., prescribes the method by which barbers and apprentice barbers from other states may qualify for a Florida certificate to practice barbering without the necessity of attending a school or college of barbering in this state. In particular, §476.11(1)(b)1., 2., F. S., sets forth two alternative requirements:

> (b) 1. Has a license or certificate of registration as a practicing barber *from another state or country* which has substantially the same standard of requirements for licensing or registering barbers as required by this chapter, or
>
> 2. Can prove by sworn affidavit that he has practiced as a barber in *another state* or country for at least five years immediately prior to making application in this state; shall upon payment of the required fee be eligible to take an examination to determine his fitness to practice as a registered barber. (Emphasis supplied.)

In State v. Storaasli, 230 N.W. 572, 180 Minn. 241, it was held that a military reservation is neither a "country" nor "state" within the meaning of a Minnesota licensing statute; "state" being a territorial subdivision having an organized civil government.

In view of the foregoing, it is my opinion that absent a license from another state, a person barbering at a military reservation in the state would not be deemed to have "practiced as a barber in another state" within the contemplation of the provisions of §476.11(1)(b)2., F. S.

Your question is answered in the negative.

065-19—March 2, 1965

TAXATION

HOMESTEAD TAX EXEMPTION— HOUSEHOLD GOODS AND PERSONAL EFFECTS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

> **1. Does §192.201, F. S., apply to only household goods and personal effects or does said section encompass all personal property?**
>
> **2. What is the scope of the phrase "household goods and personal effects" as used in said section?**

Said §192.201, F. S., insofar as here material, provides that "there shall be exempt from taxation to every person residing and making his or her permanent home in this state household goods and personal effects of the assessed value of one thousand dollars . . ." This section of the statutes originated as Ch. 29743, 1955, the title of which provided, "An act providing tax exemption of household furniture and personal effects of persons residing and making their permanent home in this state to the assessed value of one thousand dollars." This language was suggested by, if not taken from, §11, Art. IX, State Const., which provides in part that: "There shall be exempt from taxation to the head of the family residing in this state, household goods and personal effects to the value of five hundred dollars . . . ," which lan-

guage originated as a part of said §11, Art. IX, as adopted at the general election in 1924. The 1930 amendment of said §11, Art. IX, State Const., made no change in the quoted language.

In Tarpon Springs v. Chrysostomides, 108 Fla. 500, 146 So. 845, text 846, the Sup. Ct. of Fla., remarked that said §11, Art. IX, State Const., insofar as it exempted from taxation household goods and personal effects, "applies only to that particular and limited kind of personal property designated in that section as 'household goods and personal effects,'" which was held not to include "appurtenances and appliances of a pressing club."

The term household goods has been defined as "articles of household use of a permanent nature, which are not consumed in their enjoyment; articles with which a residence is equipped, other than fixtures, designed in their manufacture as instruments of the household. It fairly embraces articles commonly used in a family, including everything about the house that is usually held and enjoyed therewith, and that tends to the comfort and accommodation of the household . . ." (38 C.J.S. 946).

The term personal effects is defined in Black's law dictionary as "articles associated with person, as property having a more or less intimate relation to person of possessor; 'effects' meaning movable or chattel property of any kind." Personal effects is a term generally including such tangible property as is worn or carried about the person; effects movable or chattel property of any kind; goods and items of property having a more or less intimate relation to the person. (28 C.J.S. 836). Personal effects have been held to be personal property having a more or less intimate relation with person of the owner, such as wearing apparel, jewelry, baggage, silverware, etc. ("personal effects" in 32 Words and Phrases Perm. Ed. 418-423, and supplement).

Section 192.201, F. S., appears to be more in the nature of an extension of the provision in §11, Art. IX, State Const., exempting from taxation household goods and personal effects, than a new and independent separate exemption in addition to the constitutional exemption, and should be so construed, and as so construed the overall exemption provided is limited to $1,000, not a total of $1500.

In the light of the above and foregoing, question 1 is construed as applying only to household goods and personal effects and as having no application to tangible personal property generally; and the answer to question 2 is limited to the definitions of household goods and personal effects and should not be extended beyond such definitions.

065-20—March 4, 1965

TAXATION

IMPOSITION OF TAXES ON LEASEHOLD INTERESTS PURSUANT TO §192.62, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

In what manner and under what procedure should the interests in real property subject to taxation under §192.62, F. S., be taxed?

Section 192.62, F. S., provides that "any real property which for any reason is exempt or immune from taxation but is being used, occupied, owned, controlled or possessed, directly or indirectly by a person,

firm, corporation, partnership or other organization in connection with a profit making venture, whether such use, occupation, ownership, control or possession is by lease, loan, contract of sale, option to purchase, or in any wise made available to or used by such person, firm, corporation, partnership or organization, shall be assessed and taxed to the same extent and in the same manner as other real and personal property." Following this quoted language there appear certain exemption provisions exempting the properties mentioned in §192.62(2), F. S.

Leasehold and other interests in lands for a term of years "however long, are chattels real, falling within the classification of personal property, and ordinarily are not embraced by the term 'real property' or 'real estate' as used generally in statutes; and this is true although the lease gives the tenant an option to purchase . . ." (51 C.J.S. 531 and 532, §26). "The interest of a tenant in a term for years is deemed at common law personal property as distinguished from real estate, however long its duration in years, as in case of leases which sometimes run for ninety-nine or nine hundred and ninety-nine years." (32 Am. Jur. 39, §16). In II Blackstone's Commentaries (Chitty) 386, we find the statement that "chattels real, saith Sir Edward Coke, are such as concern, or savor of, the realty; as terms for years of land." In Matthews v. McCain, 125 Fla. 840, 170 So. 323, text 325, the court remarked that "the lease in question was made for a term of five years. It was a chattel real." In 3 Thompson on Real Property 1959 Replacement, 6, §1016, the statement is made that "at common law, estates for years were classified as chattels real and regarded as personal property." To the same effect see also the authorities collected in 6 Words and Phrases, Perm. Ed., 715 and 716. The interest of a tenant for years in real property, when subject to taxation, has, in the absence of statute, usually been assessed as personal property and not as real property. (84 C.J.S. 212, §95; 2 Cooley on Taxation, 4th Ed., 1268, §593). Life estates, including leases for the life of a person or persons in being, have usually been held to be real and not personal property, and subject to taxation as such when taxable separately from the fee title.

In the absence of statute providing otherwise the levy and assessment of ad valorem taxes in Florida "is on the realty itself, at its full cash (or just) value, regardless of the existence of estates in it" (Bancroft Investment Corp. v. Jacksonville, 157 Fla. 546, 27 So.2d 162, text 167). Section 192.62, F. S., authorizes and permits the separate assessment of ad valorem taxes on leasehold interest in real property under the circumstances therein provided, the same "to be assessed and taxed to the same extent and in the same manner as other real and personal property." This being true, it appears that leasehold and similar interests mentioned in §192.62, F. S., if for fixed terms of years or periods of time, should be considered as personal property and assessed on the personal property tax roll, while leases for life, whether the life of the lessee or some other person, should be assessed on the real property tax roll. The remainder of the fee title to the real property, from which the leasehold or similar interest was derived, should be assessed as real property on the real property tax roll. The valuations of the leasehold interest and of the remainder of the fee title, after the separation therefrom of the leasehold or like interest, should not, for purposes of taxation, exceed the total value of the real property had there been no grant of the leasehold or like interest; that is, the assessment on the leasehold interest, and on the remainder after the granting of the leasehold or similar interest, should total the full cash or just value of the lands out of which each interest was derived. After the granting of the leasehold interest, we have two interests, one the leasehold interest

and the other the remaining interest. The leasehold interest should be assessed in the name of the lessee and the remaining interest in the landowner. Where the leasehold or similar interest is for a term of years or other fixed period of time, the leasehold should be assessed as personal property on the personal property tax roll. Leaseholds, being immovable interests, should be assessed on the personal property tax roll, not on the intangible personal property tax roll, the leasehold interest being of immovable, not movable property.

Where taxes on leasehold interests for years or a fixed period of time, which should be assessed on the tangible personal property tax roll, become delinquent, the taxes thereon should be collected in the manner provided in Ch. 200, F. S., through the issuance of tax warrants; but when taxes on leases for the life of a person or persons in being become delinquent, the same having the status of real property, a tax certificate should be issued therefor, encumbering the life estate of the owner.

065-21—March 4, 1965

REGULATION AND TAXATION OF COMMERCE

LICENSE AND LICENSE TAXES AND REGULATORY FEES—PRIVATE INVESTIGATIVE AGENCIES

To: Judson A. Samuels, Attorney, State Racing Commission, Miami

QUESTION:

Are personnel of private investigative agencies and patrol agencies within the purview of Ch. 493, F. S., who have paid the fees required by §493.06, F. S., and have been issued a license under §493.08, F. S., who are employed by a jai alai fronton, required to pay the occupational license taxes required by §§550.10 and 551.07, F. S.?

A reading of Ch. 493, F. S., will reveal that it requires the licensing of private investigative agencies, patrol agencies and similar businesses as a condition to engaging in such businesses. The secretary of state is charged with administering said Ch. 493, F. S., and enforcing the same. Section 493.03, F. S., requires the filing of applications for licenses under said chapter, requiring the furnishing of material information concerning the applicant. In addition to the information required to be furnished by the applicants under §493.03, F. S., the secretary of state is authorized to make an independent investigation concerning the applicant. "When the secretary of state shall be satisfied of the good character, competency and integrity of the applicant," he may issue to him a license upon the payment of the fees provided for in §493.06, F. S. Section 493.14, F. S., provides for the suspension or revocation of such licenses for the reasons and causes mentioned and set out in said section.

It is clear from a reading of Ch. 493, F. S., that it provides for regulatory licenses as distinguished from occupational licenses imposed for revenue purposes. This chapter aims at the regulation of the business of private investigative agencies, patrol agencies, and similar businesses, and does not impose an occupational or license tax for revenue purposes, as do §§550.10 and 551.07, F. S. There is a distinction between revenue producing statutes and regulatory fees. In this state, state hotel commission fees, outdoor advertising permit fees, state board of dispensing opticians fees, dance hall licenses under §205.37, F. S., insurance agents and solicitors fees, cigarette permits issued under the cigarette

taxing laws, funeral director fees, and similar fees have been held regulatory fees and not excise taxes, and not within the purview of §205.16, F. S., relating to license tax exemptions for war veterans. (1951-1952 AGO 322 and 323) This distinction between taxes and regulatory fees is recognized in §10, paragraph 2, Art. I, U. S. Const., where it is provided that: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . ."

Regulatory fees are extracted under the police power of the state for regulatory purposes; taxes, including occupational license taxes, are imposed under the taxing power of the state for revenue purposes (53 C.J.S. 451, §3), and for different purposes. The fees paid by private investigative agencies, patrol agencies, and others within the purview of Ch. 493, F. S., and especially §§493.06 and 493.08, F. S., are in the nature of regulatory fees and not revenue taxes, and are separate and distinct, and for other purposes, from the occupational license taxes imposed by §§550.10 and 551.07, F. S.

Your question is answered in the affirmative.

065-22—March 4, 1965

TAXATION

PROPERTY EXEMPT FROM TAXATION PURSUANT TO §192.06(3), F. S.—APPLICATION OF RULE IN SIMPSON V. BOHON, 31 So.2d 406

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Does the rule applied by the court in Simpson v. Bohon, 159 Fla. 280, 31 So.2d 406, to the use of rentals derived from a fraternal or lodge building in paying off a mortgage encumbering such building, apply to rentals derived from an educational building used for a like purpose?

Simpson v. Bohon, 159 Fla. 280, 31 So.2d 406, involved the tax status of a lodge building of Jacksonville Lodge No. 221, benevolent and protective order of Elks, a fraternal order, located on lot 1, block 33, Hart's map of the city of Jacksonville, 43.1% of which was rented for commercial purposes, a large portion of the rents received being used to pay off a mortgage encumbering the said building, the remaining 56.9% of the said building being used for fraternal and lodge purposes. The owner of such building claimed tax exemption for the portion of the building rented for commercial purposes on the basis of §192.06(3), F. S., permitting the rental of a portion of a building, "provided, not more than seventy-five per cent of floor space of said building or property is rented, and the rents, issues and profits of said property are used for educational, literary, benevolent, fraternal, charitable or scientific purposes of said institutions . . ." The court held that the use of the funds derived from the rental of the said 43.1% of the said building for the purpose of paying off the mortgage encumbering the said building was not within the purview of the above-quoted proviso from §192.06(3), F. S., and that the said 43.1% of the said building was subject to ad valorem taxation. The claim had been made that the funds derived from such rentals had been used for charitable purposes. The court remarked that "the stern fact is that not one dollar of this huge sum found its way into the charity fund. There is a vast difference in

collecting money and paying it out in charities and that of creating a capital estate."

The above question is directed to the Jones college, a nonprofit corporation organized and incorporated under and pursuant to Ch. 617, F. S., regulating corporations not for profit. The said corporation acquired by deed of conveyance a building in Duval county, within which the Jones college is presently operating a college, conducting regular classes in college level courses, and other educational functions, and dormitory facilities for some of the students attending the said college. We are advised that the "Jones College is fully accredited on the Junior College level as a Junior College of Business by the Accrediting Commission for Business Schools, Washington, D. C., and is listed by the United States Office of Education as an institution of higher learning in The Educational Directory, Part 3, Higher Education, current edition." The said college appears to have also been recognized by the Florida board of control as a degree granting institution, and is listed in the Oct. 1964 edition of the Florida Educational Directory, published by the Florida state department of education, as a nonstate supported junior college. We are also advised that Jones college is eligible to apply for accreditation and membership in the southern association of colleges and schools as a special purpose institution.

When we consider the Jones college in the light of the opinions of the court in Simpson v. Jones Business College, Fla., 118 So.2d 779, and the authorities therein cited or mentioned, we reach the conclusion that if the facts outlined in Mr. Sears' letter of Jan. 29, 1965, are as therein stated, that the said Jones college is in fact an educational institution within the purview of §1, Art. IX, and §16, Art. XVI, State Const.; however, the character of the ownership alone is not sufficient for tax exemption; there must be utilization for one or more of the purposes mentioned in the last above-mentioned sections of the State Const. (Riverside Academy v. Watkins, 155 Fla. 283, 19 So.2d 870, text 871; State v. Doss, 146 Fla. 752, 2 So.2d 303, text 304; State v. St. Johns, 143 Fla. 544, 197 So. 131, text 134; Lummus v. Florida Adirondack School, 123 Fla. 810, 168 So. 232, text 238; University Club v. Lanier, 119 Fla. 146, 161 So. 78, text 79). "It is the property and not the corporate entity which is exempt." (Lummus v. Florida Adirondack School, *supra*). "It is only property that is held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes which may be exempt from taxation under the constitution." (University Club v. Lanier, *supra*.)

These provisions in the State Const. have been held to be limitations upon the Florida legislature so that it may not exempt from taxation any class or classes of real or personal property which the said constitution makes no provisions for exempting. (L. Maxcy, Inc., v. Federal Land Bank, 111 Fla. 116, 150 So. 249; State v. St. Johns, 143 Fla. 544, 197 So. 131; State v. Doss, 146 Fla. 752, 2 So.2d 303; Palethorpe v. Thomson, decided Jan. 26, 1965. It is provided in §16, Art. XVI, State Const., that: "the property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." In Lummus v. Miami Beach Congregational Church, 142 Fla. 657, 195 So. 607, text 608, the court remarked that: "We have the conviction that the command to tax all corporate property needs no legislation to accomplish the result intended and that the exception 'unless . . . held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes' may likewise be availed of by the appellee without enabling action by the legislature or resorting to the act

to which we have so often referred," that is §192.06, F. S. See also Fleischer Studios v. Paxson, 147 Fla. 100, 2 So.2d 293, text 294, where Lummus v. Miami Beach Congregational Church, is cited with approval.

Honorable W. Joe Sears, Jr., attorney for the assessor of taxes for Duval county, states in his letter of Jan. 29, 1965, as follows:

> The relevant facts pertaining to this matter, based upon confirmed information and data given to me, appear to be as follows:
>
> 1. Jones College is a Florida non-profit corporation which on December 31, 1964 acquired title by deed to the property (real estate and building), where the college is now situated here in Duval County. Said property is at present occupied and being used by Jones College as a private non-profit college for the purpose of conducting regular classes in college level courses, and also for dormitory facilities.
>
> 2. Not more than 35% of the floor space of said building or property is rented for other purposes, and the rents, issues and profits of said property are used for the educational purposes of said institution.
>
> 3. Jones College is fully accredited on the Junior College level as a Junior College of Business by the Accrediting Commission for Business Schools, Washington, D. C., and is listed by the United States Office of Education as an institution of higher learning in The Educational Directory, Part 3: Higher Education, current edition.
>
> 4. Jones College has been recognized by the Florida Board of Control as a degree granting institution.
>
> 5. Jones College is listed in the October, 1964 edition of the Florida Educational Directory, published by the Florida State Department of Education as a non state supported Junior College.
>
> 6. Jones College is eligible to apply for accreditation and membership in the Southern Association of Colleges and Schools as a Special Purpose Institution.
>
> 7. Section 1 of Article IX, Constitution of the State of Florida, states in part: '. . .'
>
> 8. Section 192.051, Florida Statutes, states: '. . .'
>
> 9. Section 192.06(3), Florida Statutes, states in part: '. . .'
>
> 10. Jones College being a private nonprofit school (such as Stetson University) and not a public or state institution cannot be eligible for accreditation by the State Board of Education.
>
> 11. Jones College not being a nursery, kindergarten, primary, elementary or secondary school within the State of Florida, cannot be eligible for membership in the Florida council of independent schools, the membership of same being confined to the above specified types of schools.

From the above and foregoing it seems that Jones college meets the requirements for tax exemption from ad valorem taxes as to educational properties, unless the use of the rentals from the rental of the 35% of its properties for the payment of interest on the mortgage encumbering the entire properties and the reduction of the mortgage indebtedness, is the building of a capital estate. In Simpson v. Bohon, *supra*, the agency involved was a fraternal organization which, although many of its functions and operations may be within §1, Art. IX, and §16, Art. XVI, State Const., it may not of itself be strictly within said provisions. In Johnson v. Sparkman, 159 Fla. 276, 31 So.2d 863, it was

held that a union lodge hall and business office was not used primarily for any of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const., such use being at most merely a secondary use. A labor union may be classified as being in the nature of a fraternal organization. This may suggest a distinction between an institution (1) whose purposes and function are strictly educational; (2) those whose functions are primarily educational, religious, scientific, literary or charitable; and (3) those which are primarily fraternal and only secondarily educational, etc. Fraternal organizations have been denied tax exemption as religious or educational societies (84 C.J.S. 604, text 295) but have in other cases been granted tax exemption as charitable or benevolent institutions or organizations (84 C.J.S. 605, §295).

There may well be a distinction between rentals used to pay off a mortgage on a lodge or fraternal building, and rentals used to pay off a mortgage on a school or educational building, where the lodge or fraternal building may never be used for "religious, scientific, educational, literary or charitable purposes" after the mortgage has been paid off, and it is reasonable to expect that the educational, building, after the mortgage has been paid off, will be "held and used exclusively for religious, scientific, educational, literary or charitable purposes."

In 84 C.J.S. 533, §281, the statement is made that: "the underlying reason for the exemption is that it is given in return for the performance of functions which benefit the public." In Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211, text 217, the court said that "the fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them, and the consequent relief, to some extent, of the burden upon the state to care for and advance the interests of its citizens." This rule doubtless is also applicable to properties used for scientific, educational, literary and charitable purposes, as expressed in §1, Art. IX, and §16, Art. XVI, State Const. It appears from the file before us that the building of the Jones college above-mentioned will be used primarily for educational purposes, and that such use will doubtless continue after the said mortgage has been paid off. The rental of the portions of the building mentioned in Mr. Sears' letter and its use for educational purposes appears to be within §192.06, F. S. In this case the use of the rentals for the paying off of the mortgage will have the effect of freeing the rented portions of the building for the owners' educational operations. In Simpson v. Bohon, *supra*, the primary use of the portion of the lodge building was fraternal, but not, strictly speaking, religious, scientific, municipal, literary or charitable, so as to be primarily for any of such uses, although there may well have been a secondary use or uses for such purposes or one of them. It appears from the file before us that although the entire building is not now required for the operation of the college that it is contemplated that the growth of the college will be such as to, in the not too far future, require the occupancy of the entire building for educational purposes. There is nothing in Simpson v. Bohon, *supra*, that indicates that the rented portion of the building there involved would ever be required for lodge use and purposes. It may well be that the rented portions of the building involved in Simpson v. Bohon were designed and intended as income producing property with no view of future use for fraternal or lodge use.

Whether the rule applied by the court in Simpson v. Bohon, *supra*, to the use of rentals derived from the rental of a lodge or fraternal building, should be applied to rentals derived from the rental of a building or portion of a building designed or intended for future educational use when needed, will depend largely upon the applicable facts

and circumstances of each particular case and whether the rented portion of the building will in all likelihood be needed for educational use within the foreseeable future so that it may be said that the rented portions of the building are being held for educational use within the foreseeable future.

065-23—March 4, 1965

PUBLIC RECORDS

COUNTY EMPLOYEES—DISCLOSING DETAILS OF ACCIDENT INVOLVING COUNTY VEHICLE

To: John H. Dewell, County Attorney, Bartow

QUESTION:

Are county officers and employees required by Ch. 119, F. S., to disclose the details of a motor vehicle accident, involving a county-owned vehicle, to which such officer or employee was a witness?

Section 119.01, F. S., opens public records generally to public inspection; Section 119.02, F. S., imposes penalties on those public officers who refuse to conform to the requirements of that section. Sections 119.03 and 119.04, F. S., make provision for preserving public records through the photographing of them and preserving such photographs.

"What is a public record is a question of law. A public record is a written memorial, made by a public officer and that officer must be authorized to make it . . . A public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done . . ." Amon v. Gunn, 84 Fla. 285, 94 So. 615, text 634) "A public record, strictly speaking, is one made by a public officer, in pursuance of a duty, the immediate purpose of which is to disseminate information to the public or to serve as a memorial of official transactions for public reference." (State v. Brantley, 201 Ore. 637, 271 P.2d 668, text 672 and 673) "Every memorandum made by a public officer is not a public record; papers or memoranda in the possession of public officers which are not required to be kept by them as official records, are not public records." (76 C.J.S. 113, §1, notes 14 and 15).

"The right of inspection does not extend to all public records and documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection." (Lee v. Beach Pub. Co., 127 Fla. 600, 173 So. 440, text 442; see also 45 Am. Jur. 433, §26; 76 C.J.S. 139 and 140). In these cases, certain types of public records, notwithstanding Ch. 119, F. S., are not subject to public inspection by the public generally.

Sections 317.121-317.191, F. S., require that certain reports be made to the department of public safety, and to incorporated municipal corporations when required by municipal ordinance as to accidents within their corporate limits. Section 324.051, F. S., requires that the director of public safety, sheriffs, police departments, and peace officers report accidents, within the purview of said §324.051, F. S., to the state treasurer as ex officio insurance commissioner in connection with the administration of Ch. 324, F. S. Accident reports made under and pursuant to §317.171, F. S., are confidential records.

We find nothing in the Florida Statutes, including Ch. 119 thereof,

requiring that county officers and employees disclose to any public officer, board, commission, etc., the details of a motor vehicle accident, involving a county-owned vehicle, to which such officer or employee was witness, unless such officer or employee was involved in such accident so as to be within the purview of §§317.121-317.191, F. S., above-mentioned.

It will be assumed from the question set forth that the knowledge which a county employee possesses may be used in the determination of liability of parties involved in an accident, one of which is a driver of a county vehicle. To this end, therefore, the rules of civil procedure, Rule 1.21, et seq., is the obtaining of information which a witness or party might have concerning a particular matter. Significantly, penalties for failure to disclose information under the applicable discovery procedures are provided by Rule 1.31, Florida rules of civil procedure.

It is my opinion that under the provisions of Ch. 119, F. S., a county employee is not required to disclose the details of a motor vehicle accident involving a county-owned vehicle to which the employee was a witness. His personal knowledge of facts is not a public record within the purview of Ch. 119, F. S.

We note, however, the prerogative of the board of county commissioners to make a policy declaration as to whether employees under their supervision should make voluntary disclosure of any details of a motor vehicle accident involving a county-owned motor vehicle of which they have knowledge or whether the obtaining of such information by interested parties should be had under the applicable discovery procedures.

We note, but do not discuss, the importance of cooperation between a board of county commissioners as an insured and an insurance carrier providing liability coverage for county equipment, etc., insofar as any defenses under the coverage are concerned.

065-24—March 4, 1965

HIGHER EDUCATION

FLORIDA INSTITUTE FOR CONTINUING UNIVERSITY STUDIES

To: Ernest Ellison, State Auditor, Tallahassee

QUESTIONS:

1. Does the limitation on the total staff of the institute apply to persons paid directly by the institute from the institute's appropriation for other personal services as well as persons paid from the institute's salaries appropriation?

2. Do the restrictions on the total staff of the institute apply to persons paid directly by the institute from funds received by the institute as gifts and grants from nonstate sources?

Part II, Ch. 239, (§239.0105) F. S., provides in part:

. . . The total staff of said institute including the director, division directors, professional, administrative and clerical personnel *and all other personnel of whatever category, full-time and part-time, shall not exceed the total number of positions approved by the legislature in its general appropriations act;* provided however that this provision does not include personnel employed by any state degree granting institution of higher learning performing extension services of any type through the said institute. (Emphasis supplied.)

Section 239.0107(3), F. S., provides:

Funds received by the said institute from gifts and grants received by the institute may be used to support off-campus instructional purposes at the discretion of said institute; provided, however, that the institute shall release said funds to participating institutions for personnel services rendered including but not limited to instructional salaries, travel and per diem provided by said institutions for the purpose of assisting the institute to make effective use of the said gifts and grants; provided further, that personnel services requested by the said institute for purposes of assisting the institute to make effective use of funds received through gifts or grants to said institute shall be in addition to the number of positions designated in subsections (1) and (2) of this section.

In view of the above statutory provisions, questions 1 and 2 are answered in the affirmative.

065-25—March 4, 1965

GAMBLING

LOTTERIES—WHAT CONSTITUTES

To: Edmund P. Cooper, Mayor, Town of West Miami

QUESTION:

Is the game "parlor derby" prohibited by the lottery laws of this state?

Your letter describes parlor derby as follows: "hotel guests and visitors are provided with free play money. The participants are then shown a movie of a horse race. Prior to the showing of the film the play money is bet by the participant on his choice of the horses in the race. At the conclusion of the race, the participants who, as a result of their bets, have accumulated the most play money, are awarded small gifts."

It appears that the situation described in your letter is analogous to that considered by the Sup. Ct. of this state in the case of Little River Theatre Corp. v. State ex rel Hodge, 185 So. 855, where a theatre held "bank night" wherein the winning participant was selected by chance. The contestants could either enter the theatre as paying theatre guests, or could remain outside at no expense. The game thus had both paying participants and nonpaying participants in the same manner that the parlor derby has—participants who are paying hotel guests, and participants who are nonpaying visitors. The court held that the three elements which constitute a lottery were present in the Little River Theatre contest—consideration, prize, and award by chance.

Therefore, in considering your contest in light of such decision, it appears that the elements of prize and award by chance are patent. The element of consideration is comparable in the two contests. Such element is furnished in both the parlor derby contest (by those participants who are paying hotel guests) and in the theatre bank night (by those paying theatre guests).

In 1963 the legislature enacted §849.092, F. S., which provides that the lottery laws of this state are less stringent to those sponsors who are licensed as retail licensees (Ch. 204, F. S.) or as petroleum dealers (Ch. 208, F. S.). The provisions of such sections would not be applicable to the promotional scheme set out in your letter inasmuch as the hotel sponsor of the parlor derby contest would not be a person

engaged in the business of making retail sales (§204.01(5), F. S.), nor in the business of being a petroleum dealer (Ch. 208, F. S.). It is further apparent that §849.092, *supra*, is not applicable as the requirement set out in §849.092(3), F. S., that the contestant not be required to be at the sponsor's place of business at the time of selection of a winner is not met under the circumstances applicable to parlor derby contests.

Your question is answered in the affirmative.

065-26—March 4, 1965

CRIMINAL LAW

ARREST WITHOUT WARRANT—AUTHORITY OF OFFICER AT SCENE OF ACCIDENT—CITIES AND TOWNS

To: William A. Norris, Jr., City Prosecutor, Bartow

QUESTIONS:

1. May a municipal officer lawfully arrest without warrant a person involved in a traffic accident on any street within a municipality on the basis of physical evidence or statements from witnesses where the accident did not occur in the presence of the officer?

2. If such arrest is made, must the individual be transferred to the appropriate county court for trial instead of being tried before the municipal court?

Prior to 1963, police officers could arrest without warrants only in instances involving felonies or misdemeanors committed in their presence (see §901.15, F. S.). In 1963, the Florida legislature enacted Ch. 63-175, which is set out in §317.111, F. S., as follows:

> A police officer at the scene of a traffic accident may arrest any driver of a vehicle involved in the accident when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this chapter in connection with the accident.

Under this statute, all police officers are given the power to arrest without warrant persons whom they have probable cause or grounds to believe have committed a violation of the provisions of Ch. 317, F. S. (limited by the requirement that the arrest be at the scene of the accident and be of a driver of a vehicle involved in such accident).

Section 317.011(33), F. S., defines a police officer as including municipal police officers; it is therefore apparent that municipal police officers are given the power by §317.111, *supra*, to arrest without warrants at the scene of accidents drivers of the vehicles involved in such accidents where there is probable cause to believe that the driver so arrested has committed an offense under Ch. 317, F. S.

Question 1 is answered in the affirmative with the proviso that the arrest be of a person whom the officer has probable cause to believe has violated the provisions of Ch. 317, *supra*.

Section 317.041(1), F. S., provides as follows:

> The provisions of this chapter relating to the operation of vehicles refer to the operation of vehicles upon the state-maintained highway system and county-maintained highway system throughout this state including state-maintained municipal connecting link roads as defined in §335.05(1); except that

> the provisions of §§317.071-317.211 shall apply upon highways and elsewhere throughout the state.

A close reading of the terms of such section reveal that the provisions of Ch. 317, *supra*, do not, in all instances, apply to every street of a municipality; thus, if a municipal street is not a connecting link and the violation committed by the driver is not within the provisions of §§317.071-317.211, F. S., nor one which specifically relates to all municipal streets, such as in §317.233, F. S., the particular traffic violation may not be one prohibited by Ch. 317, *supra*, even though appropriately prohibited by municipal ordinance. If the violation is not one prohibited by Ch. 317, *supra*, then, of course, §317.111, *supra*, would not apply.

With regard to question 2 as to whether an individual who has been arrested for violation of Ch. 317, *supra*, must be transferred to the appropriate county court for trial, or whether he may be tried before the municipal court, it should first be clarified that municipal courts have no jurisdiction to try a defendant for violation of Ch. 317, *supra*. It is therefore understood that your inquiry involves the right of the municipal court to try the arrested party for violation of a municipal ordinance even though the arrest of such party was made for violation of Ch. 317, *supra*. The question ultimately resolves to the question of whether the arrest made pursuant to §317.111, *supra*, will be invalidated by trying the arrested party solely in the municipal court for violation of a municipal ordinance. This question is answered by the rationale of AGO 064-154, wherein the following question was answered in the affirmative:

> May a police officer (municipal) who has probable cause to believe that a suspect is guilty of promoting a lottery, in violation of Section 849.09, Florida Statutes, arrest without a warrant such party even though such officer is aware that the ultimate disposition of the case may well be made solely by the municipal court?

A reference to such opinion reveals that the rationale of its answer is based on the proposition that where the circumstances surrounding an arrest provide a proper basis for an arrest, the fact that subsequent to the arrest no prosecution occurs will not invalidate the arrest. Thus, where a police officer has proper basis to arrest a person for committing a violation of state law, and arrests such person, and the party is then only prosecuted in a municipal court for violation of a municipal ordinance, the validity of the arrest remains intact.

This rationale is further supported by the case of State v. Young, 281 P. 17, 40 Wyo. 508, wherein an arrest was upheld where circumstances provided a proper basis even though the police officer, when making the arrest, stated other reasons as the basis of such arrest. The statement of the police officer was held to be immaterial to the validity of the arrest where the circumstances provided an adequate and proper basis for the arrest. It therefore follows that where circumstances furnish a proper basis for an arrest without a warrant, the subjective intentions of the officer are immaterial to the validity of the arrest.

In the case of Smith v. State, 155 So.2d 826, certiorari dismissed 167 So.2d 225, the Sup. Ct. of Fla., upheld as valid an arrest and search pursuant to a traffic violation even though the arrestee was not prosecuted for such traffic violation, but instead was prosecuted for an offense other than that for which he was arrested.

As is pointed out by AGO 064-154, one who is arrested for an offense which is a violation of both municipal ordinance and state law

may be prosecuted and convicted in both state and municipal courts. It is clear that if one is arrested pursuant to §317.111, *supra*, and appears to be susceptible to dual prosecution as a violator of Ch. 317, *supra*, as well as a violator of a municipal ordinance and such party suffers only a single prosecution in the municipal court for the violation of the municipal ordinance, such circumstance has inured to his advantage and he has no cause for complaint. Of course, a preferable procedure is that where an arrest is made pursuant to §317.111, *supra*, for a violation of Ch. 317, *supra*, the party be tried in the appropriate county court for the violation of Ch. 317; however, though such procedure is the most appropriate and the most desirable, there is no legal mandate which requires that it be followed, and those who have properly been arrested under §317.111, *supra*, may be tried solely in the municipal court for a violation of an applicable municipal ordinance.

Question 2 is therefore answered in the negative.

065-27—March 5, 1965

CRIMINAL LAW

RETURN OF UNIDENTIFIABLE PROPERTY SEIZED UNDER AUTHORITY OF SEARCH WARRANT

To: Edward A. Miller, Assistant County Solicitor, West Palm Beach

QUESTION:

What is the disposition to be made of stolen property which has been seized by the police but which cannot be identified as belonging to any specific person and has not been introduced or used in evidence?

It is difficult to legally support a conclusion that particular property is stolen if the identity of the rightful owner cannot be determined. In order to prosecute for larceny or possession of stolen property, it is necessary for the state to prove the identity of the owner of the property. It is therefore clear under the circumstances set out in your question that it is impossible to prove that the particular property involved is in the possession of the culprit as a result of having been stolen. There is no legal action available which the state has standing to bring which might conclude with a legal finding that the property was stolen.

If we assume arguendo that the property is known to be stolen, but the identity of the true owner is unknown, it is clear that though the thief has no title to such personal property his possessory interest gives him superior interest over all those except the true owner, or those who claim an interest through the true owner. As was set out in the case of Carter v. Bennett, 4 Fla. 283, appeal dismissed 56 U.S. 354, the possession, whether rightfully or wrongfully obtained, is a sufficient title to a plaintiff in trover as against a third party stranger or wrongdoer. It is thus clear that a thief's interest in personal property is sufficient to give him a right of action against those who wrongfully affect his possessory interest, where such persons are strangers to the true title. Hence, if the identity of the true owner is impossible of determination, the thief's interest represents the highest interest capable of determination, and the property removed from his possession should be returned to him.

Of course, if the property is contraband in nature, such as gambling paraphernalia, narcotic drugs, obscene pictures and literature, intoxi-

cating liquors (except that seized in a dwelling house, and firearms used in breach of the peace §933.14, F. S.), then it need not be returned.

065-28—March 5, 1965

LEGISLATURE

APPORTIONMENT OF THE HOUSE OF REPRESENTATIVES AND CONGRESSIONAL DISTRICTS—CENSUS

To: E. C. Rowell, Speaker, House of Representatives, Tallahassee

QUESTIONS:

1. What census should be used by the Florida legislature in apportioning the state into congressional districts in order to conform to the requirements of the equal protection clauses of the federal and state constitutions and the orders of the federal courts?

2. What census should be used by the Florida legislature in apportioning the state into legislative districts of the state in order to conform to the requirements of the equal protection clauses of federal and state constitutions and the orders of the federal courts?

Under §1, Art. I, U. S. Const., "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature." (§2, Art. I, U. S. Const.). Under said §2, Art. I, U. S. Const., a census was required to be made "within three years after the first meeting of Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct." The remaining portions of para. 3, of said §2, Art. I, of U. S. Const., as to the apportionment of the members of the house of representatives in congress appear to be superseded by subsequent amendments to the said constitution. It is provided in Amend. XIV, §2, of the U. S. Const., that: "Representatives (in Congress) shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."

Section 4, Art. I, U. S. Const., provides that: "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations . . ." Section 5 of said Art. I, U. S. Const., provides that: "Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business . . ."

From the above and foregoing it appears that under §2, XIV Amendment to the U. S. Const., the "Representatives (in Congress) shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Section 2, Art. I, U. S. Const., makes provision for the taking of a federal census every ten years, the last such census having been taken in 1960, with the next such census being taken in 1970. No other provision for the taking of a federal census being made under the U. S. Const., for apportionment of membership in the house

of representatives in congress, doubtless such apportionment must be made according to such federal census.

"Congress formerly (prior to 1929) made the apportionment by a statute passed after each census specifying the number of representatives to which each state should be entitled." (91 C.J.S. 30, §12). No apportionment was made by congress following the 1920 federal census; however, congress, by the act of June 18, 1929, adopted a procedure for reapportionment of the house of representatives in congress when no apportionment is made by the congress. This act, together with amendments, extensions and additions thereof and thereto, now appears as §2a, title 2, U.S.C. Section 2a(a) provides that:

> On the first day, or within one week thereafter of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each state, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each state would be entitled of the then existing number of representatives by the method known as the method of equal proportions, no state to receive less than one member.

Under subsection (b) of said §2a, title 2, U.S.C., it is made clear that the "Clerk of the House of Representatives, within fifteen calendar days after the receipt" of the statement provided for in subsection (a) of said §2a, "to send to the executive of each state a certificate of the number of representatives to which such state is entitled to under" said §2a, title 2, U.S.C. This certificate of the number of representatives was last furnished the executives of the several states in 1961, and was made under and pursuant to the 1960 regular federal census. The number of each state's representation in the federal house of representatives appears to have been based "upon the method known as the method of equal proportions." (See §2b, title 2, U.S.C.). Section 3, title 2, U.S.C., requires that representatives to congress "be elected by districts composed of a contiguous and compact territority and containing as nearly as practicable an equal number of inhabitants."

It is our opinion, therefore, in answer to question 1, that the federal statutes clearly require that the last preceding regular federal census be used as the basis for reapportioning the congressional seats in the congress of the U. S. We find nothing in the U. S. Const., or statutes authorizing any census other than the last preceding federal census in determining congressional districts and in apportioning the state for purposes of congressional districts.

The supreme court of the U. S. in Reynolds v. Sims, 377 U. S. 533, 84 Sup. Ct. 1362, 12 L. Ed. 2d 506, held that:

> 'As a basic constitutional standard, the Equal Protection Clause (of the United States Constitution) requires that seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is impaired when compared with the votes of citizens living in other parts of the State.' (Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, text 531; to the same effect see also WMCA, Inc. v. Lomenzo, 377 U. S. 633, 84 S. Ct. 1418, 12 L. Ed. 2d 568, text 580; Maryland Committee for Fair Representation v. Tawes, Governor, 377 U. S. 656, 84 S. Ct. 1442, 12 L. Ed. 2d 595, text 606; Davis v. Mann, 377 U. S. 678, 84 S. Ct. 1453, 12 L. Ed. 2d 609, text 617; Roman v. Sincock, 377 U. S. 695, 84

S. Ct. 1462, 12 L. Ed. 2d 620, text 629; Lucan v. Colorado General Assembly, 377 U. S. 713, 84 S. Ct. 568, 12 L. Ed. 2d 632, text 646). In Reynolds v. Sims, *supra*, (12 L. Ed. 2d. 529) it is stated that, 'Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by voters in the election of state legislators.'

The apportioning of state legislative districts, as well as of federal congressional districts, in order to achieve fair and effective apportionment and representation, must be made on the basis of a state-wide census taken in all counties at the same time and on the same basis. To use a partial census taken at one time in some counties or districts, and at other times in other counties or districts, would not effect a fair and effective state-wide representation. Only when a census taken state-wide is used will fair and effective state-wide apportionment be achieved. The equal protection of the law would not seem to be achieved should we use partial censuses taken in some areas and a general census as to other areas.

The State Const., provides that the apportionment of the state shall be in accordance with the latest federal decennial census. Section 5, Art. VII, State Const., provides:

> The Legislature shall no longer be required to provide for an enumeration of the inhabitants of the State. The last preceding decennial Federal census beginning with the Federal census of 1950 shall also be the State census and shall control in all population Acts and constitutional apportionments, unless otherwise ordered by the Legislature. As amended general election Nov. 7, 1950.

It is, therefore, our opinion in answer to question 2, that any reapportionment in Florida prior to the census of 1970, the next date for taking the federal decennial census, must be based upon the last federal decennial census of 1960.

In order to accord the equal protection of the law as between citizens and electors of the several counties of the state, as well as the congressional districts of the state, a state-wide census must be used.

065-29—March 15, 1965

CRIMINAL LAW

DETERMINATION OF INSOLVENCY BY COMMITTING MAGISTRATE—APPOINTMENT OF PUBLIC DEFENDER, DUTIES

To: Mack S. Futch, Assistant State Attorney, Gainesville

QUESTION:

When a person is brought before the county judge, as committing magistrate, on a charge of having committed a noncapital felony, does such judge have the authority to adjudge such person to be insolvent and to order the public defender to represent such person before he is charged with any offense in the court having jurisdiction to try the offense?

Section 27.51(1), F. S., contains the following provision:

> The public defender shall represent any person who is determined to be insolvent as provided in this act, who is under arrest for, or is charged with, a noncapital felony if such per-

son requests it or if the court, on its own motion, so orders and such person does not knowingly, understandingly, and intelligently waive the opportunity to be so represented.

Section 27.52(1), F. S., contains the following provision:

> The determination of insolvency of any accused person shall be made by the court and may be done at any stage of the proceedings.

My construction of these statutes is that they authorize the county judge as committing magistrate to determine the insolvency of any person charged before him with the commission of a noncapital felony and to thereupon order the public defender to represent such person, and that this may be done at any stage of the proceedings before the county judge.

Your question is answered in the affirmative.

065-31—March 18, 1965

DIVISION OF CORRECTIONS

USE OF PRISON LABOR IN CITRUS AND VEGETABLE HARVESTING PROHIBITED

To: D. D. Covington, Jr., State Senator, Dade City

QUESTION:

> **Is there any statutory restriction against the division of corrections making available inmates of state prisons to private citrus and vegetable growers in this state for the purpose of using said inmates in the harvesting of fruit and vegetables?**

From the facts which you have presented to me, it is my understanding that the citrus and vegetable industries in this state are facing a grave problem with reference to the harvesting of their crops due to a change in the federal regulations with respect to offshore labor. Your request essentially seeks to use inmates of our state prisons for the purpose of harvesting these crops in an effort to protect the economy of the state's agricultural industry. Further, it is my understanding that these prison inmate laborers would be paid equally with existing domestic and offshore labor.

The following quoted language from 41 Am. Jur. 904, Prisons and Prisoners, §30, is relevant to your question on this matter:

> The hiring out of convicts to persons or corporations desiring their services in the execution of private enterprises or otherwise, as distinguished from working them in the penal institutions or on public works, is practiced in some states, although in others the practice has been abolished or forbidden by constitutional or legislative mandate, *and it should be noted that the modern sentiment is toward the abolishment of contract convict labor,* and the substitution therefor of the employment of the prisoners on public works of some kind . . . (Emphasis supplied.)

The above-quoted language expresses the majority view in the United States with reference to the subject matter of your inquiry. The public policy of this state insofar as the use of prisoners in private industry is concerned has been expressed by §951.10, F. S., as follows:

> No county convicts shall be leased to work for any private interest.

The language of the above-cited statute shows a specific declaration

by the legislature of this state against the use of prisoners for any private interest.

With reference to the prisoners who are confined to prison camps operated under the supervision of the state road department, §945.07, F. S., specifically sets out that these camps shall be used for such public purposes as the board may by regulation prescribe. Therefore, it would seem that the language of §945.07, F. S., would preclude the use of prisoners confined in a road prison camp in any activity other than those involving public purposes as prescribed by the board of commissioners of state institutions.

Section 945.11, F. S., specifically authorizes the board of commissioners of state institutions to enter into agreement with certain state institutions and agencies whereby the services of inmates of state prisons and road camps could be used by the said state agencies or institutions. The language of this section shows a specific intent on the part of the legislature of this state to allow the use of prisoners in outside activities not under the jurisdiction of the division of corrections where the services performed are in a public works program under the jurisdiction of another state agency or institution.

I realize the seriousness of the problem which the citrus and vegetable industries are facing in the state due to the changes in the federal law with respect to offshore labor and your reasons for seeking such a plan where prisoners may be used by the said industries are most laudable.

However, the legislature has not given the board of commissioners of state institutions or the division of corrections any authority to use prison labor in private industry. Furthermore, the legislature has expressed a definite prohibition against such a use (see §951.10, *supra*, F. S.). Therefore, without such legislative authorization, I feel that the board and the division would be engaging in an unauthorized activity if they did make prisoners available to work for private concerns.

065-32—March 23, 1965

PUBLIC RECORDS

SMALL CLAIMS COURTS—RECORDS

To: Samuel V. Holch, Judge, Small Claims Court, Palatka

QUESTION:

Are the dockets of small claims courts in this state public records within the purview of §119.01, F. S., as public records?

We are here concerned specifically with the small claims court for Putnam county, established by §6, Ch. 26787, 1951, of which requires that "a docket shall be maintained in which shall be indicated every proceeding and rule had in each case." Examples of other small claims court statutes having like or similar provisions include §6, Ch. 26787, 1951, relating to Putnam county; §6, Ch. 63-1063, relating to Lake county; and §7, Ch. 63-843, relating to Okaloosa county. This listing of courts and counties is not exhaustive.

Section 42.08, F. S., relating to small claims courts generally, provides that the "clerk shall keep a docket book, in which he shall make fair and accurate entries of all causes brought before the court, and minutes of all proceedings, including the service and return of process, the appearance of such parties as may appear, the fact of trial, whether

by court or jury, the judgment, including damages and costs separately stated, the issuing of execution and to whom issued, with the date thereof and the return thereof, and a marginal memorandum of the items of all costs, including witness fees; which docket or a certified copy thereof, shall be evidence of the matters therein stated." This section is substantially identical with §37.15, F. S., relating to docket books required to be kept and maintained by justice of the peace courts. Some local or special acts establishing small claims courts have provisions for dockets like or similar to said §§37.15 and 42.08, including §5, Ch. 63-763, relating to Indian River county; §6, Ch. 63-857, relating to Highlands county; and §6, Ch. 63-858, relating to Union county.

"Justices of the peace are generally required by statute to keep dockets, in which they are to enter records of proceedings before them." (51 C.J.S. 240, §125). A reading of paragraph b. of said 51 C.J.S. 241-245, relating to "Matters to Be Entered and Sufficiency of Entries," reveals that the general requirements for dockets of justices of the peace are substantially the same as the requirements contained in said §37.15 and §42.08, F. S. We are, therefore, of the opinion that the docket requirements of §6, Ch. 26787, 1951; §6, Ch. 63-1063; §7, Ch. 63-843; and other similar statutes requiring the keeping of justice of the peace dockets, although cast in general terms and not in detail, were intended to require the keeping of dockets substantially in conformity with said §§37.15 and 42.08, F. S., which are substantially the same as are the requirements generally as reflected in 51 C.J.S. 240-245, §125.

In some states justice of the peace courts have been held to be courts of record. However, in other states such courts are not regarded as courts of record (51 C.J.S. 13, §1). The district court of appeal, third district of Florida, in Vighio v. Wood, Fla. App., 101 So.2d 922, text 924, held that "the court of a justice of the peace is not a court of record," citing authorities. This case appears to have originated in a small claims court presided over by a justice of the peace. For a definition of a court of record see 21 C.J.S. 20, §5. Although a court of justice of the peace does not appear to be a court of record in Florida, a docket of a justice of the peace in Florida appears to be in the nature of minutes of a court and should be treated as such. Although there are but few authorities on the question, the general rule seems to be that "the dockets entered of a justice of the peace are in the nature of minutes of a court and . . . must be kept open to the reasonable inspection of the public."

We are, therefore, of the opinion that the docket books of small claims courts, as well as those of justice of the peace courts, are records within the purview of §119.01, F. S., and are open for personal inspection at all reasonable times. As the current docket book of a small claims court or of a justice of the peace court is, at least in effect, the minute book of the court, the right of inspection of it by the public under §119.01, F. S., should not be permitted to unduly interfere with the operation of the court. Doubtless in some instances the small claims court or justice of the peace court has no clerk so that if the judge of the small claims court, or justice of the peace, may be required to be away from his office for periods of time during each day or other period of time, inspection may not be required during such periods of time; however, such justice of the peace or judge should take care that his office is not closed for unreasonable periods of time. The dockets of small claims courts and justice of the peace courts are required to show the filing and the progress of the case, as well as the trial thereof and the entry of the judgment therein. The public has a right to inspection during such period of time. The docket books of

small claims courts should be kept open and available to the public from the filing of the suit until it is finally disposed of, for the purpose of following the litigation by interested parties, and thereafter as a public record of a judgment.

065-33—March 24, 1965

JUVENILES

FINGERPRINTING AT CHILD TRAINING SCHOOLS PROHIBITED

To: Arthur G. Dozier, Director, Division of Child Training Schools, Marianna

QUESTION:

Do the child training schools of this state have the authority to fingerprint juveniles committed to said training schools?

The answer to your question must be arrived at by consideration of the pertinent provisions of Ch. 39, F. S., relating to juvenile courts. Section 39.03(6), F. S., provides:

> (6) *No child taken into custody shall be fingerprinted or photographed except by special order of the juvenile court judge,* and no original nor any copy of any so taken shall be filed or recorded in any place other than the juvenile court, but all originals and copies thereof shall be delivered over to the juvenile court at the time directed in the order and promptly destroyed; provided, that *this shall not apply to the photographing of children at any industrial school.* Any record of the child made by any law enforcement officer or other person except the officers and employees of the juvenile court shall be made in a separate record kept for that purpose, identifying the child only by the initials and juvenile court case number of the child; shall not be a public record; and shall not be open to inspection by anyone other than the officers and employees of the juvenile court and by the child, the parents or legal custodians of the child, and their attorneys; provided however, that the records of child traffic violations shall be kept in the full name of the violator and shall be open to inspection and publication in the same manner as adult traffic violations. (Emphasis supplied.)

As can be seen from a reading of this section, the legislature has specifically provided that no child taken into custody shall be fingerprinted or photographed except by a special order of a juvenile court judge. This section also specifically exempts the photographing of such children at any industrial school to which the child may be committed. I find no statutory provision within Ch. 39, F. S., which gives any person the right to fingerprint a child within the definition of §39.01(6), F. S., without an expressed special order of a juvenile court judge.

I realize the reasons which you have for desiring the authority to fingerprint boys and girls committed to the training schools in Florida and that it is your opinion that such a practice would greatly benefit the operations of the said training schools, but due to the language of §39.03(6), F. S., I am of the opinion that you may not fingerprint a child without the express authority of a juvenile court judge or a legislative amendment to Ch. 39, F. S.

Based on the foregoing statutory provisions and the reasoning thereon, your question is answered in the negative.

065-34—March 30, 1965

MOTOR VEHICLES

LARGE HOUSE TRAILERS—MOTOR VEHICLE LICENSE TAGS

To: Arch Livingston, Motor Vehicle Commissioner, Tallahassee

QUESTION:

Is it necessary for owners of large house trailers used by their owners as dwellings or homes to procure license tags for such trailers under Ch. 320, F. S., in order to move such trailers across highways, roads or streets while fleeing or escaping from rising waters?

Section 320.01(1), F. S., provides that when construing Ch. 320, F. S., that the term "Motor Vehicle" includes "automobiles, motorcycles, motor trucks and all other vehicles *operated over the public highways and streets of this state* and *propelled by power other than muscular power*, but does not include traction engines, road rollers and such vehicles as run only upon a track." (Emphasis supplied.) This definition of a "motor vehicle" appears to have originated as a part of §1, Ch. 7275, 1917, in substantially its present form; and was repeated in §2, Ch. 8410, 1921; in §1, Ch. 10182, 1925, as well as in §1006, R.G.S., 1920. Section 1, Ch. 9157, 1923, in defining motor vehicles appears to have omitted the phrase "operated over the public highways and streets of this state;" however, the phrase was returned to the statutes by §1, Ch. 10182, 1925. The language used in §320.01(1), F. S., has remained unchanged since the adoption of the Florida Statutes, 1941, to the present time.

The reported opinions of the supreme court of Florida seem to establish the rule that a motor vehicle license and license tag, issued under and pursuant to Ch. 320, F. S., and especially §320.08 thereof, are in the nature of licenses for the operation of the licensed motor vehicle over the highways, roads and streets in the state, to the extent that where an owner permits another to operate such automobile over such highways, roads and streets of the state, he authorizes the operation of the said vehicle by such other person as his agent. (Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 and 80 Fla. 441, 86 So. 629; Herr v. Butler, 101 Fla. 1125, 132 So. 815; Engleman v. Traeger, 102 Fla. 767, 136 So. 527; *In Re* Jones, 130 Fla. 667, 178 So. 424) over such highways, roads and streets.

Chapter 320, F. S., requires that: "before a *motor vehicle* may be *operated over the public highways and streets of this state*" that it be duly registered and licensed under said chapter. (Emphasis supplied.) First, a vehicle to be subject to license taxes under said Ch. 320, F. S., must be a motor vehicle, and second, it must be operated over the public highways or streets of the state. Only when a "trailer" is self-propelled, or is propelled by a motor vehicle or other source of power primarily for the purpose of transportation, may it be classified as a motor vehicle within the purview of said Ch. 320, F. S. (Palethorpe v. Thomson, decided Jan. 26, 1965, not yet reported.)

The said house trailers while moving over or across the public highways while escaping from rising water would not appear to be motor vehicles operated over the public highways and streets of this state anymore than would a house, a threshing machine, a hay bailer, and other equipment not used in connection with the transportation of persons and property. Before any such house trailer is moved over or across a highway or street permission should be obtained from the

highway patrol or the sheriff, and the state road department where within its rules and regulations requiring the obtaining of a permit from it or its agents.

065-36—April 5, 1965

STATE EMPLOYEES

COMPENSATION CLAIMS FOR UNPAID BUDGETED SALARY

To: Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee

QUESTION:

Once a salary has been duly budgeted and the state department of education fails to pay the entire salary due to budgeted federal funds not being available, is an adjustment on previous salary payments on receipt of said federal funds in violation of the State Constitution?

The pertinent facts of your inquiry are as follows: On July 1, 1963, the state department of education employed a person to coordinate its program under the manpower development training act, at which time it was agreed that the employee would receive a salary of $1,000 per month. Accordingly, the state department of education operating budget, the legislative budget and budget of the federal agency reflected a salary of $12,000 for the position. Because federal funds were unavailable, the employee was paid $833.33 for the month of July, 1963, $883.33 in Aug., 1963, together with an adjustment of $50. on the July salary, and was paid the above-stated salary through Nov., 1963. In Dec., 1963, federal funds became available and an adjustment was made on all previous salary payments from July through Nov., 1963, to provide the budgeted monthly salary of $1,000.

Section 11, Art. XVI, State Const., extra compensation claims, provides:

> No extra compensation shall be made to any officer, agent, employee, or contractor after the service shall have been rendered, or the contract made . . .

After construction of the above-cited section of the constitution, it appears clear that retroactive pay may not be honored. However, the factual situation presented to this office is not a retroactive increase in salary but merely an adjustment to a previously budgeted salary to cure an inequity caused by the failure of the treasury division of the state department of education to receive the designated matching federal funds.

Therefore, based upon the above-cited authority and observations, it is my opinion that this adjustment to meet the duly budgeted salary is not extra compensation within the contemplation of the State Constitution.

065-37—April 12, 1965

COURTS

ADDITIONAL JUDGES FOR JUVENILE COURT AND CRIMINAL COURT OF RECORD, DADE COUNTY

To: Dade County Senatorial Delegation, Tallahassee

QUESTION:

May metropolitan Dade county create any additional judges for the juvenile court of Dade county, and the criminal court

of record in and for Dade county; or may such additional judges be created only by the Florida legislature through legislative enactment?

Your inquiry requires consideration of the limitation placed upon the electors of Dade county by §11, Art. VIII, State Const. While that section has authorized a home rule charter of government for Dade county, it has limited the exercise of governmental authority under the authorized home rule charter in certain areas.

It is our opinion that the following provisions of the State Const., preclude the creation of additional judges for the Juvenile court of Dade county and the criminal court of record in and for Dade county by action of the board of county commissioners of metropolitan Dade county, such function being reserved to the legislature.

The Dade county home rule charter, or the board of county commissioners of Dade county, pursuant to a charter provision, "May abolish and may provide a method for abolishing from time to time all offices provided for by Article VIII, Section 6, of the Constitution or by the Legislature, except the Superintendent of Public Instruction and may provide for the consolidation and transfer of the functions of such offices, provided, however, that there shall be no power to abolish or impair the jurisdiction of the Circuit Court or to abolish any other court provided for by this Constitution or by general law, or the judges or clerks thereof although such charter may create new courts and judges and clerks thereof with jurisdiction to try all offenses against ordinances passed by the Board of County Commissioners of Dade County . . ." §11(1)(f), Art. VIII, State Const., FSA 26.

In construing both the authority conferred upon the electors of Dade county, the board of county commissioners of Dade county and the limitations placed upon the legislature insofar as its power over the local affairs of Dade county is concerned, we believe §11(9), Art. VIII, State Const., controlling. That section provides:

> It is declared to be the intent of the Legislature and of the electors of the State of Florida to provide by this section home rule for the people of Dade County in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, *except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.* (Emphasis supplied.)

The people of Florida, by the adoption of §12, Art. V, State Const., have reserved unto the legislature plenary power to deal with all matters pertaining to juvenile courts, provides:

> The legislature shall have power to create and establish juvenile courts in such county or counties or districts within the state as it may deem proper, and to define the jurisdiction and powers of such courts and the officers thereof, and to vest in such courts exclusive original jurisdiction of all or any criminal cases where minors under any age specified by the

> legislature from time to time are accused, including the right to define any or all offenses committed by any such persons as acts of delinquency instead of crimes; to provide for the qualification, election or selection and appointment of judges, probation officers and such other officers and employees of such courts as the legislature may determine, and to fix their compensation and term of office; all in such manner, for such time, and according to such methods as the legislature may prescribe and determine . . .

As to criminal courts of record, §9, Art. V, State Const., provides:

> (1) Organization and judges. The legislature may provide for the establishment of a criminal court of record in any county. Judges of criminal courts of record shall be elected for a term of four years by the qualified electors of the county, in the same manner as other state and county officials. Their compensation shall be fixed by law and paid by the county.
>
> In any county having a population in excess of 125,000, and not more than 250,000, according to the last decennial federal census, or census authorized by the legislature and paid for by the county, the legislature may provide for an additional judge of the criminal court of record for such county, provided that any law having for its purpose the creating of an additional judge of said court in such county shall not become effective unless ratified by a majority of the participating voters of such county in an election presenting the same for approval or rejection. *In any county having a population of more than 250,000 according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.* (Emphasis supplied.)

The word "county" modifying "judge" in the underscored language, *supra*, formed the basis for Sept. 11, 1957, request for advisory opinion by the Hon. LeRoy Collins, former governor of the state. In response to that inquiry the Sup. Ct. of Florida determined that the underscored sentence, *supra*, should be read "as if the term, 'county,' modifying, 'judge,' were stricken and the term, 'of the criminal court of record,' inserted following the word, 'judge.'" *In Re* advisory opinion to the governor, 96 So.2d 904, text 905.

While it is contrary to the policy of this office, established by my predecessors, not to express opinions as to the validity of acts of the legislature, that being a function solely for the judiciary, the question presented contemplates an analysis of existing sections of the organic law as distinguished from acts of the legislature or ordinances of the board of county commissioners of metropolitan Dade county, which in some areas may be considered of equal dignity.

It is my opinion that the language of §11(9), Art. VIII, State Const., *supra*, in effect operates as a supremacy clause and preserves unto the legislature the functions and authority within the limitations established by §12, Art. V, State Const., pertaining to juvenile courts, and §9, Art. V, State Const., pertaining to criminal courts of record. Hence, the authorization of additional judges for the juvenile court of Dade county and the criminal court of record in and for Dade county is a matter for legislative consideration.

065-38—April 15, 1965

BOARD OF CONSERVATION

VALIDITY OF STATE STATUTES RELATING TO NATURAL RESOURCES OF ATLANTIC OCEAN, GULF OF MEXICO AND NAVIGABLE WATERS OF THE STATE

To: Randolph Hodges, Director, Florida Board of Conservation, Tallahassee

QUESTION:

Are Ch. 370, F. S., and other statutes and laws of Florida relating to conservation of the natural resources found in the Atlantic ocean, gulf of Mexico, and other navigable waters within the boundaries of Florida valid and existing statutes and laws?

This question is posed by a letter, under date of March 25, 1965, from Gilbert E. Roller and Roy L. Kinney, Jr., both of Sebastian, Florida, to "All Florida Senators and Representatives," wherein they declare the statutes and laws of Florida relating to salt water fisheries and the Florida board of conservation to be invalid and inoperative. With this we do not agree.

Under the common law of England and of the United States, as made applicable in Florida (§2.01, F. S.):

> Fish, as long as they remain unconfined in their natural element and are not taken and reduced to possession, are not the subject of private property, but are public property; and not even the owner of the soil over which a stream frequented by fish flows owns the fish therein. Likewise, the fact that a particular person is engaged in the business of taking fish does not give him any property in the fish prior to taking. While they are in a state of freedom fish are the property of the sovereign power, in Great Britain, of the king; and in the United States, of the state, in whose waters they may be, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common, and the ownership thereof cannot be claimed by any particular individual. (36A C.J.S. 499 and 500, §2; see also 22 Am. Jur. 666-668, §2 and 14 Fla. Jur. 369 and 370, §4).

The Sup. Ct. of Florida, in *ex parte* Powell, 70 Fla. 363, 70 So. 392, text 396 and 397, stated that:

> Under the laws of this state, the public waters and the fish therein are held by the state for the benefit of the people of the state, subject to such regulations of the use thereof as the lawmaking power may provide. The right of individuals to fish in the public waters of the state is subject to state regulation for the general welfare.

In State v. Stoutamire, 131 Fla. 698, 179 So. 730, text 733, the court said that: "In fish in the public waters the State has a sovereign right primarily and essentially of preservation, conservation and regulation for the people of the State whose right is to take fish from the public waters subject to the regulations imposed by the State for the benefit of the people of the State." This language from State v. Stoutamire was quoted with approval by the Sup. Ct. of Florida in Nash v. Vaughn, 133 Fla. 499, 182 So. 827, text 828. (See also Alford v. Finch, Fla., 155 So.2d 790, text 792, et seq., relating to game and fresh water fish).

Historically, as appears from the above-mentioned authorities, salt-water fish, shellfish, sponges, etc., found within the salt waters of the state belong to the state, and are held by it for the use and benefit of the people of the state, and may be taken by the people only in accordance with the regulations imposed by the laws and statutes of the state and not otherwise.

Section 370.10, F. S., provides in part that:

> All fish, shellfish, sponges, oysters, clams and crustacia found within the rivers, creeks, canals, lakes, bayous, lagoons, bays, sounds, inlets and other bodies of water within the jurisdiction of the State, within the Gulf of Mexico and the Atlantic Ocean, within the jurisdiction of the state . . . are property of the State and may be taken and used by its citizens and persons not citizens, subject to the reservations and restrictions imposed by these statutes.

Chapter 370, F. S., was derived primarily from Ch. 28145, 1953, which chapter together with amendments, revisions and extensions thereof now comprise present Ch. 370, F. S., 1963. Said Ch. 28145, 1953, repealed §§371.02-371.31, and Chs. 373-375, F. S., 1951, and enacted Ch. 370, F. S., "a new chapter" in Florida Statutes. A reading and study of said §§371.02-371.31, clearly reveals Ch. 370, F. S., created and adopted by said Ch. 28145, 1953, to have been a revision, consolidation, amendment and extension of said §§371.02-371.31 and Chs. 373-375, F. S., 1951. Said Ch. 370, F. S. 1953, has been revised and readopted as statute law by Chs. 29615, 1955, 57-1, 59-1, 61-1 and 63-2. Chapter 370, F. S., 1963, is the controlling statute law on salt water fish and conservation in the state.

Salt and fresh water fisheries have been regulated to a more or less extent since as early as 1861, when Ch. 1121, 1861, required the obtaining of a fishing license from the boards of county commissioners, who were designated as fish commissioners. See also Chs. 3292, 3293, 1881; 3871, 1889; 4558, 4563, 1897; 5435, 1905; 6532, 6535, 1913; 6877, 6969, 1915; 7389, 1917; 11838, 1927; 13644, 1929; 16178, 1933; 17016, 1935; 19274, 1939; 21945, 1943; 22819, 22823, 1945; 25209, 1949; 26766, 1951, relating to fisheries and their regulation. Revisions of the laws of general operation in 1891, were included in the Revised Statutes, 1892, in operation in 1905, were included in the General Statutes, 1906, in operation in 1919, were included in the Revised General Statutes, 1920, in operation in 1939; were included in the Florida Statutes, 1941, which statutes have been revised at every regular session of the legislature since 1941.

United States v. California.—The opinion of the Sup. Ct. of the U. S. in United States v. California, 332 U. S. 19, 67 Sup. Ct. 658, 91 L. Ed. 1889, and its decree in the same case in 332 U. S. 804, 68 Sup. Ct. 20, 92 L. Ed. 382 and 383, holding that the United States and not the state of Texas was "possessed of paramount rights in, and full dominion and power over the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters, extending seaward three nautical miles . . ." This rule was confirmed in United States v. Texas, 339 U. S. 707, 70 Sup. Ct. 918, 94 L. Ed. 1221 and United States v. Louisiana, 339 U. S. 699, 70 Sup. Ct. 914, 94 L. Ed. 1216.

However, congress by its enactment of the submerged lands act (Ch. 65, public law 31, 83rd congress, 1st session), approved May 22, 1953 (title 43, §§1301, *et seq.*) released and relinquished all claims of the U. S. to submerged lands, including seaward boundaries, to the several states bordering on international waters, the said submerged

lands act providing that the U. S. thereby "releases and relinquishes unto said states and persons aforesaid, except as otherwise reserved herein, all right, title and interest of the United States, if any it has, in and to all said lands, improvements and natural resources," being the interests held by the above-mentioned opinions of the U. S. Sup. Ct. to be vested in the U. S. instead of in the states, natural resources being defined in said submerged lands act as including "without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, sponges, kelp and other marine and animal life . . ." The said submerged lands act was upheld as a grant of U. S. property under clause 2, §3, Art. IV, of the U. S. Const., in Alabama v. Texas, 347 U. S. 272, 74 Sup. Ct. 481, 98 L. Ed. 689.

The submerged lands act became a law on its approval, on May 22, 1953, a date prior to the enactment and effective date of Ch. 28145, 1953, which was approved June 12, 1953. Granting that the opinion and decree of the Sup. Ct. of the U. S. in United States v. California, United States v. Louisiana and United States v. Texas, *supra*, had the effect of divesting the state of Florida of its title and authority to legislate concerning saltwater fish, etc., or had the effect of a declaration that the state never was vested with authority to legislate on such subject matter; title to and the right to legislate on the said subject matter became and was clearly vested in the legislature after the submerged lands act became a law. Chapter 28145, 1953, which revised and recodified the then existing statutes and laws relating to the natural resources, including fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life, within the navigable waters and water bottoms of such waters within the boundaries of the state.

The above-stated question is answered in the affirmative.

065-39—May 3, 1965

STATE OFFICERS AND EMPLOYEES

FIXING OF SALARIES AND OTHER COMPENSATION OF STATE AND JUDICIAL OFFICERS

To: J. J. Griffin, Chairman, House Appropriations Committee, Tallahassee

QUESTION:

Must the salaries or other compensation of state executive and judicial officers be fixed and determined by legislative enactment, or may the fixing and determination of such salaries and compensation be delegated to some state officer, board, commission or agency?

Section 29, Art. IV, State Const., fixes the salaries of the governor and the cabinet officers, in the amounts therein mentioned, and provides further that:

> The legislature may after eight years from the adoption of this constitution increase or decrease any and all of such salaries.

Section 19, Art. V, State Const., provides that:

> Justices of the supreme court and judges of all other courts shall receive for their services *salaries or compensation provided by law.* (Emphasis supplied.)

Section 4(4), Art. V, State Const., provides for a clerk and marshal of the Sup. Ct. of Florida:

. . . *their compensation* shall be fixed by law. (Emphasis supplied.)

Section 5(4), Art. V, State Const., provides for a clerk and marshal of each of the district courts of appeal:

. . . their *compensation* shall be *fixed by* law. (Emphasis supplied.)

Section 16, Art. IV, State Const., provides for the appointment by the governor of all commissioned officers of the state militia, including the adjutant general, and that:

. . . the duties and *compensation* of all officers so appointed shall be as *fixed by law.* (Emphasis supplied.)

Section 27, Art. III, State Const., provides:

The legislature shall provide for the election by the people or appointment by the Governor of all State and county officers, not otherwise provided for by this Constitution, and *fix by* law their duties and *compensation.* (Emphasis supplied.)

Section 30, Art. III, State Const., provides:

Laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions on no other subject.

Section 30, Art. III, State Const., appears to have originated as §3, Art. IV, State Const., in the same form as said §30, Art. III, State Const. Said §30, Art. III, State Const., is a stricter limitation on appropriation acts than is §16, Art. III, of the said Const., on legislation generally. In Advisory Opinion 14 Fla. 285, text 286, the justices of the Florida Sup. Ct. made the following statement, concerning said §3, Art. IV, State Const., of 1869, that:

It seems to follow from this that the spirit, if not the letter of the constitution, renders the junction of a law making appropriations for salaries and other current expenses with any other subject is obnoxious to the charge of a violation of this provision.

Said §30, Art. III, State Const., has been referred to by the Florida Sup. Ct. as relating to what has been commonly referred to as the general appropriations act. Said §30 refers to such acts as:

. . . laws making appropriations for salaries of public officers and other current expenses.

There is a clear distinction between a bill regulating some governmental function as its primary purpose and providing incidentally an appropriation to carry out this function, including a salary for its chief executive officer, and an act primarily designed to fix salaries of public officers and current expenses of the state government. (Advisory Opinion, 14 Fla. 283; Amos v. Mosely; Lee v. Dowda, 155 Fla. 68, 19 So.2d 570).

Although not dealing with state officers but with county officers, it is noted that §6, Art. VIII, State Const., in addition to providing for the election of a clerk of the circuit court, a sheriff, county assessor of taxes, tax collector, superintendent of public instruction and county surveyor, also provides:

. . . their powers, duties and *compensation* shall be *prescribed by law.* (Emphasis supplied.)

Under §7, Art. V, of the said Const., the compensation of county judges:

. . . shall be *provided for by law.* (Emphasis supplied.)

Under §9, Art. V, of the said Const., the compensation of the judge and prosecuting attorney of the criminal court of record:

. . . *shall be fixed by law.* (Emphasis supplied.)

There may be a technical difference between the legislature fixing a salary or compensation of an officer, and prescribing or providing for such a salary.

Section 4, Art. IX, State Const., provides:

> No money shall be drawn from the Treasury except in pursuance of appropriations *made by law.* (Emphasis supplied.)

In Advisory Opinion, 156 Fla. 48; 22 So.2d 398, text 400, the justices of the Sup. Ct. of Florida said:

> The word *law* means a statute adopted by both Houses of the legislature. (Emphasis supplied.)

Here there had been an attempt to appropriate state funds by a resolution which was held not to conform to the requirements of §4, Art. IX, State Const. In Advisory Opinion, 43 Fla. 305, 31 So. 348, there was also an attempt to appropriate state funds by a joint resolution, which was held not to conform to the requirements of said §4, Art. IX, State Const. The justices remarked:

> The resolution under discussion lacks the essential requisites to make it a law of an enacting clause.

To the same effect see also Commonwealth v. Wade's Administrators, 126 Ky. 791, 104 S.W. 965, text 966; State v. Davidson, 114 Wis. 563, 90 N.W. 1067, text 1068; U. S. Fidelity & Guaranty Co., CCA Ohio, 31 Fed. 2d 919, text 920; Nelson v. Swift, D. C. App., 271 Fed. 2d 504, text 505; Cain v. United States, D. C. Ill., 73 Fed. Supp. 1019, text 1021. (See also Black's law dictionary definition of "by law.")

We entertain serious doubt that the making of a lump sum appropriation earmarking a gross amount of money for the payment of state officers' salaries, and delegation to a state officer or board or commission the power and authority of determining and fixing the amount of salary or compensation to be paid such state officers would conform to the constitutional requirement that such salary "be fixed by law," or terms of like import, required by such constitutional requirements. The use of such terms or words in the constitution seems to require that the legislature itself determine and fix such salaries or compensation.

065-40—May 4, 1965

INTER-AMERICAN CENTER AUTHORITY

EMPLOYEES—REIMBURSEMENT FOR CERTAIN EXPENSES INCURRED

To: William W. Gibbs, Attorney for Inter-American Center Authority, Miami

QUESTION:

> **May the inter-American center authority reimburse its officers, agents and employees for costs and expenses, other than per diem and travel expenses within §112.061, F. S., incurred while in travel status for promotional purposes deemed necessary for the development of the interama?**

In the preamble to Ch. 26614, 1951, creating the inter-American center authority, it is made to appear that the continued prosperity and development of the United States, and of the state, require improved relations and increased trade with Latin-American republics and other countries, that it is the policy of the state to foster and develop domestic and international trade for the benefit of the entire state and

nation, and particularly trade in the natural, processed and manufactured products of this state and country, accompanied by exchange of skills, the promotion of cultural understanding, and the creation of friendship and solidarity between nations and peoples of the western hemisphere. The inter-American cultural and trade center in Florida serves national public interest; is an enterprise for the development of improved relations and increased trade with the republics of Latin America and other countries, will sustain employment and production, improve living standards, and contribute to the national security and defense, and will provide improved opportunity for the participation of small businesses in American foreign trade.

It is provided in §554.02(2), F. S., that: "Members of the authority shall not be entitled to compensation for their services as members but shall be reimbursed for traveling expenses as provided in §112.061, *and may be compensated from funds available to the authority* for any special or full-time service performed in its behalf, as officer or agent of the authority." (Emphasis supplied.) This reference to funds available to the authority seems to be to funds other than funds appropriated by the state legislature, unless specifically appropriated by legislative act to such purposes. It is noted that the authority may acquire property, which would seem to include moneys, by gift or grant (§554.07(4), F. S.). The authority doubtless has the power and authority to accept and receive gifts and donations of property and funds from persons, firms and corporations earmarked for the promotion or exercise of any of its powers, duties or authority, such powers, duties and authority being set out in §§554.07 and 554.071, F. S. Among the powers and authority of the inter-American center authority is the development of domestic and international trade in the western hemisphere, and the creation of friendship and solidarity throughout the said western hemisphere.

Among the powers and authority of the authority is the provision "to borrow money for any of its authorized purposes and for expenses incidental thereto, including expenses incurred during the period of organization and construction" prior to the operation of the center, "and to issue negotiable revenue bonds payable solely from revenue accruing from the operation of such center and from authorized activities incidental thereto; and to provide for the payment of the same." (§554.07(10), F. S.).

From these observations we conclude that the inter-American center authority may reimburse its officers, agents and employees for legally incurred costs and expenses, other than per diem and travel expenses within §112.061, F. S., incurred while in authorized travel status for authorized promotional purposes deemed necessary, by the inter-American center authority, provided for by §554.02(1), F. S., for the development of the interama.

065-41—May 5, 1965

TAXATION

TAX RETURN BY OWNER OF SUBSURFACE RIGHTS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Must the "return for taxation" by the owner of subsurface rights, provided for in §193.221, F. S., be made each and every year in order to continue the assessment each year, or is

the initial return sufficient to continue the assessment as long as the owner retains title?

2. Where subsurface rights are "returned" by the initial owner and part or all of said subsurface rights are conveyed to another, must the new grantee "return" his subsurface rights to the tax assessor?

Section 193.221, F. S., was first derived from Ch. 57-150, which was held invalid because under said section only the owner of some record interest in the land itself made return thereof for purposes of separate taxation (see Cassady v. Consolidated Naval Stores Co., Fla., 119 So.2d 35). This defect appears to have been cured by the amendment of the said section made by Ch. 63-355, under which tax returns of the subsurface interests may be made "by the owner of the fee, or other interest in fee, or the owner or claimant of such subsurface rights or interests, or any person, firm or corporation claiming by, through or under the subsurface owner or claimant."

Section 193.12, F. S., requires that "every person owning or having the control, management, custody, direction, supervision or agency of property of whatsoever character that is subject to taxation under the laws of this state, shall return under oath the same for taxation to the county assessor of taxes in the proper county, or other proper officer, *on or before April 1 of each and every year . . .*" (Emphasis supplied.) Section 193.12, F. S., imposes certain penalties for failure to make such tax returns. This language appears to have originated as a part of §16, Ch. 5596, 1907, and has continued since its said enactment. Similar requirements for tax returns are contained in §§199.07, F. S., (intangible personal property) and §200.08, F. S. (tangible personal property). However, where no such tax returns are made it is the duty and obligation of the tax assessor to search out and discover the taxable properties of the county or other taxing area and assess the same upon his tax roll (§193.21, F. S.). "Taxpayers must comply with the requirements of statutes providing that owners of taxable property shall make a list or inventory thereof and return it to the assessors as a basis for assessment." (84 C.J.S. 758 and 759, §396).

Outstanding oil, gas, mineral and other subsurface rights vested in other than the owner of the fee title to the lands have in many instances constituted clouds on such lands and have caused the owners trouble when they come to sell their lands or a portion thereof. It is our understanding that one of the purposes of said §193.221, F. S., was to permit landowners, in cases where the owners of the subsurface rights have abandoned them, to purchase the tax sale certificates issued against and encumbering subsurface rights and obtain tax deed therefor thereby revesting such rights in the owner of the fee, where there are no other persons interested in the subsurface rights.

From the above and foregoing question 1 is answered in the affirmative; however, the tax assessor may use his discretion when no subsequent return or returns are made at least until a tax sale certificate is issued on the subsurface right. If such a tax sale certificate is purchased by the owner of the surface rights and a tax deed is issued thereon the tax assessor should, unless a separate return is made by the owner of the combined rights, assess the two interests together as one assessment. Question 2 is answered in the affirmative; however, if no such return is made the tax assessor may continue to assess the same in the name of the grantor of such right, unless he is advised of the name of the grantee, in which case the rights may be assessed in his name.

065-42—May 6, 1965

TAXATION

DUTY OF COUNTY TAX ASSESSOR IN FURNISHING MUNICIPALITIES WITH COPIES OF APPLICATIONS FOR HOMESTEAD TAX EXEMPTION

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Does §167.72, F. S., require the assessors of taxes of the several counties of the state to prepare and furnish the municipal tax assessors in his county copies of applications for homestead tax exemptions filed with him as to properties located in the several municipalities of his county, without cost to the said municipalities?

Under §167.72, F. S., applicants for homestead tax exemption on properties located in municipalities are deemed "to have made application for such homestead exemption from taxation of the municipality in which such homestead is located, and the municipal tax assessor shall treat said application and give it the same consideration as if it had been personally filed with him." This statute does away with the requirement of filing separate applications for homestead tax exemption with both the county assessor and the city assessor. This procedure does not appear to present any constitutional difficulty.

The said statute further provides that: "It shall be the duty of the tax assessors of the municipalities in this state to obtain a copy of each such application for homestead exemption on file in the office of, and approved by, the tax assessor of the county in which such municipality is located, and it shall be the duty of the several county tax assessors to furnish such copies to municipal tax assessors in their counties when requested." This provision when read literally seems to require that the municipal assessors obtain copies of such applications from the county assessor, and at the same time require that the county assessor furnish the municipal assessor with such copies. The first of such requirements standing by itself might be construed as requiring that the municipal assessor obtain the copies at municipal expense; likewise, the second of such requirements might be construed as requiring that the county assessor furnish such copies at county expense. This seems to require a construction of the said statutory provision.

Section 5, Art. IX, State Const., seems to contemplate that funds derived from state taxation be used for state purposes only, and that taxes derived from county taxation be used for county purposes. In some instances the costs of combined state and county purposes may be paid from state or county funds or from combined state and county funds (Jackson Lumber Co. v. Walton County, 95 Fla. 632, 116 So. 771, text 782; Amos v. Mathews, 99 Fla. 1, 126 So. 308, text 322; Palm Beach County v. State, 99 Fla. 379, 126 So. 360). The U. S. circuit court of appeals, 5th circuit, in Hoskins v. City of Orlando, 51 Fed. 2d 901, text 904, held that municipal taxation in Florida was authorized for municipal purposes only and none other, evidently basing its holding on the above-mentioned cases relating to state and county taxation in Florida.

Under the above-mentioned authorities the use of county funds, or the use of funds that except for such use might become excess fees of the county assessor's office, in preparing copies of the applications for

homestead tax exemptions for the municipal tax assessor's office, poses a constitutional question which must be taken into consideration when construing said §167.72, F. S. "Legislative acts are entitled to great respect and weight, and it is the duty of the courts to sustain, or uphold, them if possible," and, "When reasonably possible, and within the bounds of legitimate construction and legislative intent, statutes should be construed to uphold, and avoid doubts as to, their constitutionality." (16 C.J.S. 357 and 359, §98).

From the foregoing we conclude that §167.72, F. S., should not be construed as requiring the county assessor of taxes, either directly or indirectly, to use county funds in furnishing the information provided for in said §167.72, F. S., to the municipal tax assessors. The statute clearly contemplates that the municipal assessor or his designated agent have access to the county tax records and that he may obtain the information contemplated by said §167.72, F. S., from the county tax roll. The county assessor of taxes may also enter into a contract with the municipality to furnish the information contemplated by said §167.72, F. S., at not less than actual cost.

065-43—May 6, 1965

COURTS

JUVENILE COURT HEARING TO DETERMINE CHILD'S MENTAL CONDITION—COMMITMENT

To: Lamar Winegeart, Jr., Judge, Juvenile Court, Duval County, Jacksonville

QUESTIONS:

> **1. May the juvenile court, before or during a hearing for a child alleged to have committed a delinquent act, an act which would have been a crime were that child an adult, conduct a hearing pursuant to §917.01(1), F. S., to determine the child's mental condition when the court has reasonable grounds to believe that the child is insane?**
>
> **2. If the answer to the above question is affirmative, then may the juvenile court, upon a hearing to determine the mental condition of the child and finding at that hearing said child to be insane and incompetent to interpose a rational defense, take steps to have the child committed to the proper state institution pursuant to §917.01(2)?**

Chapter 917, F. S., which delineates the circumstances under which a trial court, on its own motion or motion of counsel, may make a determination as to the sanity of a defendant in a case before the said court, relates only to defendants in courts having trial jurisdiction over criminal cases wherein a person is charged with a crime and is subject to being convicted of the said crime.

Section 39.10(3), F. S., states as follows:

> (3) An adjudication by a juvenile court that a child is a dependent or delinquent child shall not be deemed a *conviction*, nor shall the child be deemed to have been found guilty or to be a *criminal* by reason of that adjudication, nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction, nor to disqualify or prejudice the child in any civil service application or appointment. (Emphasis supplied.)

A reading of the foregoing §39.10(3), shows, in my opinion, that a juvenile court has no trial jurisdiction in criminal cases. Furthermore, a juvenile who is dealt with by a juvenile court as a delinquent is not considered to be a criminal, and even if he is adjudicated a delinquent child this would not be considered a conviction of a crime. If a juvenile is to be dealt with as a criminal, he must be transferred by the juvenile court to a court having criminal trial jurisdiction pursuant to the provisions of §39.02(6), F. S.

Because of the provisions of the above referred to statute, it is my opinion that a juvenile court is not one within the provisions of §917.01, F. S., and therefore a juvenile judge could not make a determination as to a child's mental condition pursuant to the provisions of the said section. Therefore, question 1 is answered in the negative. Question 2, which refers to the commitment of a child by a juvenile judge to a state mental institution pursuant to §917.01(2), F. S., must be answered in the negative because of the reasoning set out in answer to question 1.

However, in examining Ch. 39, F. S., I have noted that §39.08 gives the juvenile court the power to order a child to be treated by a physician, psychiatrist or psychologist. This section also provides that a juvenile judge, for the purpose of either examination or treatment, may order the child to be sent to a "suitable place."

The provisions of §917.01(2), F. S., could not be used for the purpose of committing a child to a proper institution for psychiatric care and treatment, but it is my opinion, because of the language of §39.08, that a juvenile judge would have two alternatives to secure any examination or treatment in this area which he deems necessary.

The first approach would be to order the child sent to a local establishment which he considers a "suitable place" for the examination or treatment. As a second alternative, if the juvenile judge is of the opinion that the child needs intensive psychiatric treatment in a state hospital, the provisions of §394.57, F. S., could be utilized. This section provides a procedure whereby certain interested parties can file a petition with a county judge requesting that the child involved be admitted to the childrens' psychiatric division of a state hospital for intensive care and treatment.

I realize that the above set out alternatives are not as direct as the procedure provided for in §917.01, F. S., but in my opinion they will accomplish the same objective in the end result, that is, seeing that the child involved receives any necessary care and treatment which he may need in the opinion of a juvenile judge.

065-44—May 6, 1965

ACTIONS AT LAW

POWER OF CONSTABLE TO LEVY EXECUTIONS

To: Grady Hall, Constable, Altamonte Springs

QUESTIONS:

1. What are the powers of a constable to levy upon goods pursuant to writs of executions issued by various courts of the state?

2. Is a constable required to maintain a docket book for executions?

Section 11(3), Art. V, State Const., provides that there shall be elected by the voters in each justice's district, a constable who shall

perform such duties as may be prescribed by law.

Section 47.12, F. S., pertains to the commencement of suits at law and designates by whom process may be served. It provides "All process, except that issuing from a justice of the peace court, shall be served by the sheriff or any constable of the county in the district in which it is to be served. Process of a justice of the peace court may be served by a sheriff of the county or by a constable."

Section 37.18, F. S., in prescribing the duties of the constable, provides that "Constables in the several counties shall serve all summonses and warrants, and levy all executions placed in their hands, agreeable to the tenor thereof, and make due returns of the same to the court to which they may be made returnable . . ."

Based upon the aforesaid statutes, it clearly appears that a constable may serve the process of courts other than justice of the peace courts within his jurisdiction when directed by the court and writ placed in his hands. Process from the justice of the peace courts may be, when directed to the constable, served by him throughout the county. You will note §37.18, F. S., specifically says, "levy all executions placed in their hands." Similar language is used in §30.15, F. S., in speaking of the powers of a sheriff in executing such process and writs as "may come to their hands." It is therefore essential that the writ of execution be directed to and placed in the hands of the constable in order for him to legally levy upon any goods. If an execution is directed to and placed in the hands of the sheriff, the constable has no authority to levy.

The case of State, *ex rel* Brown v. Duckworth, 15 So.2d 668, is a very able discussion on the powers and duties of the sheriff, constable and justice of the peace. The court, concerning the question of whether or not the justice of the peace was entitled in his discretion to allow the sheriff of the county to act as executive officer of the justice's court, said:

> We are unable to find a statute making it the lawful duty of a Justice of the Peace to deliver all process issuing out of the Justice of the Peace Court to the Constable of the District for service. The same is true as to the Sheriff of the County (resourceful counsel for the parties fail to cite in the briefs or during oral argument at the bar of this Court such authority). The single exception is provided by Section 936.01, where the Justice of the Peace acts in the capacity of a Coroner, when the issuing warrant is directed to the Constable.

Thus, we see based upon the aforesaid case, although §37.16, F. S., provides that the sheriff or any constable of the county shall be the executive officer of courts of the justice of the peace, the justice of the peace has wide discretion in determining who shall serve process issuing from the court.

Therefore, question 1 is answered accordingly.

Section 30.17, F. S., requires the sheriff to keep an execution docket in which all executions, orders and decrees that are directed to him pertaining to the collection of money is kept. Every justice of the peace is required under §37.15, F. S., to keep a docket book containing "the issuing of execution and to whom issued with the date thereof and the return thereon."

Chapter 219, F. S., pertains to the handling of public moneys. Section 219.04, F. S., provides as follows:

> Each officer as defined in this act, shall keep a cash book, or books, wherein shall be entered daily all receipts and disbursements of public money, either by items or by summaries

of itemized entries in other records, including machine tapes, kept in such office. The cash book shall be balanced, it shall show the amount of money on hand, and shall be a permanent record of the office.

The cash book and the lists and records subsidiary to it and essential to the proper identification of and accounting for public money received or disbursed shall be on forms prescribed by or approved by the state comptroller.

Although I am unaware of any statute per se requiring the constable to keep a docket book for executions, it would appear that some form of a book would be necessary and essential in order to make an adequate, proper and accurate return on the writ. This is particularly so, in view of the provisions as set forth in §219.04, F. S.

Question 2 is therefore answered accordingly.

065-45—May 17, 1965

WITNESSES

FEES FOR PERSONS SUBPOENAED TO TESTIFY BEFORE RACING COMMISSION

To: George D. Johnson, Jr., Comptroller, Florida State Racing Commission, Miami

QUESTION:

What witness fees are persons subpoenaed to testify before the Florida state racing commission entitled, including:

1. **Full-time state employees;**
2. **Part-time state employees paid on a per diem basis;**
3. **Employees of permit holders; and**
4. **Persons employed in the stables on the racing grounds?**

Under §550.02(4), F. S., the Florida state racing commission:

> May take testimony concerning any matter within its jurisdiction and each member thereof may administer oaths for that purpose. Said commission shall have the power to issue summons and subpoenas for any witness and subpoenas duces tecum in connection with any matter within the jurisdiction of the commission under its seal and signed by any member of the commission or the supervisor or assistant supervisor of racing.

In 97 C.J.S. 421, §35, it is stated that:

> Witnesses are entitled to compensation only under statutes providing therefor. They are not entitled thereto at common law, or in cases for which the statute does not provide. Statutes relating to calling of witnesses and making no provision for their compensation do not entitle them thereto.

To the same effect see also 58 Am. Jur. 501, §874, and 5 Jones Commentaries on Evidence 4474, §2295, and VIII Wigmore on Evidence, 1961 Ed., 132 §2201, et seq. The payment of witness fees, as a condition to compulsory attendance, by the person calling a witness was required as early as 5 Eliz. c. 9, §12, dating around 1563. It is provided in and by §90.15, F. S., that:

> No person shall be compelled to attend a court as a witness in any civil cause unless the party in whose behalf he is summoned shall first pay him the amount of compensation to which he would be entitled . . .

This requirement is similar to the one contained in 5 Eliz. c. 9, §12, above-mentioned. This seems to indicate a public policy in Florida.

Upon an examination of statutes and laws relative to witnesses subpoenaed before administrative boards of this state, we feel that the legislature, when it enacted said §550.02(4), F. S., intended that persons called or subpoenaed as witnesses before the state racing commission be paid a witness fee; such laws relative to witnesses before administrative boards seem to establish a public policy for such payments.

Witness fees generally are provided for by §90.14, F. S., and are presently $3 per day and mileage at the rate of 5¢ per mile. Section 90.141, F. S., provides that: "Any *law enforcement officer* of any municipality, county or the state who shall appear as an official witness to testify at any hearing or law action *in any court* of this state as a direct result of his employment as a law enforcement officer shall be entitled to per diem and traveling expenses at the same rate provided for state employees under §112.061, F. S." (Emphasis supplied.) Because of the limitation in said §90.141, to hearings before "any court" we doubt its application to persons subpoenaed as witnesses before the state racing commission. We reach this conclusion notwithstanding §1, Art. V, State Const., providing that:

> The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, courts of justices of the peace, and such other courts, including commissions, as the legislature may from time to time ordain and establish.

065-46—May 17, 1965

TAXATION

TAX EXEMPTION—FEE TITLE AND LEASEHOLD INTEREST HELD BY THIRD PARTY

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

> **What is the tax status of real property in this state when a leasehold interest therein is held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purpose, sufficient to entitle the property to tax exemption had the property been held in fee by the lessee instead of merely a leasehold estate?**

It is provided in and by §16, Art. XVI, State Const., that: "The property of all corporations . . . shall be subject to taxation *unless such property be held and used exclusively* for religious, scientific, municipal, educational, literary or charitable purposes." This section of the State Const., appears to be self-executing and needs no legislation to accomplish its purpose. (Lummus v. Miami Beach Congregational Church, 142 Fla. 657, 195 So. 607, text 608; Fleischer Studios v. Paxson, 147 Fla. 100, 2 So.2d 293, text 294). To be entitled to tax exemption the property must not only be held for one or more of the purposes mentioned but it must also be used for one or more of said purposes. This provision of the State Const., is by its terms applicable only to corporate property; Section 1, Art. IX, State Const., is applicable to property other than corporate property. This section provides that: "The legislature shall provide for a uniform and equal rate of taxation . . . and

shall prescribe such regulations as shall secure a just valuation of all property, exempting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes." This constitutional provision is not self-executing and needs legislation to be effective. Tax exemptions provided by the legislature under this section appear in §§192.06, 192.07, 192.09, F. S., etc. Tax exemptions under this constitutional provision appear in §192.06(3), F. S., which provides that: "Such property of educational, literary, benevolent, fraternal, charitable and scientific institutions, as shall actually be occupied and used by them, for the purposes mentioned are exempt from ad valorem taxation. There seems little if any distinction between tax exemptions under §16, Art. XVI, State Const., as to corporations, and under §1, Art. IX, State Const., as implemented by the Florida Statutes. In either case the requirement is that the property claimed to be tax exempt must be held and used exclusively for one or more of the purposes mentioned in said §1, Art. IX, and §16, Art. XVI, State Const.

In L. Maxcy, Inc., v. Federal Land Bank, 111 Fla. 116, 150 So. 248, text 250; State v. St. John, 143 Fla. 544, 197 So. 131, text 134; State v. Doss, 146 Fla. 752, 2 So.2d 303, text 304; Franks v. Davis, Fla., 145 So.2d 228, text 231; Palethorpe v. Thomson, filed Jan. 26, 1965, but not yet reported in the Southern Reporter, the Sup. Ct. of Florida construed said §1, Art. IX, and §16, Art. XVI, as limitations "upon the power of the Legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself." From these authorities we gather that, except where specifically exempted from taxation by the constitution itself, such as homestead tax exemption and the exemptions provided for in §9, Art. IX, State Const., to widows and disabled persons, that before property may be exempted from taxation it must be held and used exclusively for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const.

In the absence of statute, "Under Florida taxing statutes the levy and assessment is on the realty itself, at its full cash value, regardless of the existence of estates in it." (Bancroft Investment Co. v. City of Jacksonville, 157 Fla. 546, 27 So.2d 162, text 167). For an interest in property to be entitled to tax exemption under §1, Art. IX, and §16, Art. XVI, State Const., and statutes implementing said constitutional provisions, that interest must be held and used exclusively for one or more of the purposes mentioned in the statutes. The use of property for one or more of the purposes mentioned in the constitution is not sufficient for tax exemption; there must also be ownership and a holding for one or more of such purposes. In St. Augustine v. Middleton, 147 Fla. 529, 3 So.2d 153, the city of St. Augustine has leased for a period of 3 years the Alcazar hotel in St. Augustine, to be used for the operation of a public museum, art galleries, libraries, historical exhibits, municipal offices, etc., which purposes would appear to be within the purview of §1, Art. IX, and §16, Art. XVI, State Const. However, as one of the conditions of the lease the city was to pay, in addition to a rental of $1, the expenses of insurance and other charges for caring for and maintaining the hotel building, which may well have been deemed compensation for the leasehold interest in addition to the $1 rental. The court remarked that: ". . . to entitle the whole or a severable portion of the property of a private corporation to exemption from taxation, the entire property, or the severable portion thereof that is sought to be exempted from taxation, must clearly be shown to 'be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes.'" There was no attempt to return the leasehold

interest separate and apart from the fee title and claim tax exemption only on the leasehold interest. The interest of the lessor at least was held subject to taxation.

In Bancroft Investment Co. v. City of Jacksonville, 157 Fla. 546, 27 So.2d 162, the United States had sold certain federal property to purchasers under a contract of sale, with the consideration therefor payable in annual installments, the property itself being retained as security for the payment of the said consideration. The interest of the vendee was held liable to taxation at least so long as the interest of the federal government was protected. In Simpson v. Bohon, 159 Fla. 280, 31 So.2d 406, text 407, and in State v. Doss, 150 Fla. 491, 8 So.2d 17, text 18, portions of a building were used for different purposes, one tax exempt and the other not tax exempt. In these cases the exempt portion was exempted and the nonexempt portion was subjected to taxation. Section 192.62, F. S., appears to provide for the taxation of leasehold interests, not entitled to tax exemption, although the fee title out of which the leasehold interest was granted was entitled to tax exemption.

Real property, out of which a leasehold estate has been granted for a period of time, is not entitled to tax exemption, although the leasehold interest is held and used exclusively for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const., so as to be entitled to tax exemption, unless the remainder interest in the lessor is also held and used exclusively for one or more of the said purposes mentioned in the constitution. Where the use is exclusive under the leasehold interest, the property of the lessor would nevertheless have to be held for one or more of the purposes mentioned in the constitution. The leasehold interest vested in the lessee and the remainder interest remaining in the lessor, are two separate and distinct interests, so that one may be entitled to tax exemption and the other may not be entitled to tax exemption. One of such interests may be entitled to tax exemption, while the other interest may be subject to taxation, the controlling factor in either case being whether or not it is held and used exclusively for one or more of the purposes mentioned in the State Const. This seems to be largely a question of fact to be determined from surrounding facts, circumstances and evidence brought or coming to the attention of the tax assessor.

065-47—May 24, 1965

TAXATION

DATA PROCESSING AND SIMILAR EQUIPMENT USED WITHIN THE STATE

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is data processing and similar equipment located in this state and used therein by their owners or lessees subject to taxation in Florida?

Section 1, Art. IX, State Const., requires that: "The legislature shall provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, exempting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes." Section 16, Art. XVI, State Const., also provides: "The property of all corporations . . . shall be subject to taxa-

tion unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes."

The Sup. Ct. of Fla., in L. Maxcy, Inc. v. Federal Land Bank, 111 Fla. 116, 150 So. 248, text 250; State v. St. John, 143 Fla. 544, 197 So. 131, text 134; State v. Doss, 146 Fla. 752, 2 So.2d 303, text 304; Tyson v. Lanier, Fla., 156 So.2d 833, as well as other decisions of Florida appellate courts, held that the above-quoted language from the State Const., ". . . must be construed as a limitation upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particular classes specified in the organic law itself." Personal property taxes are imposed in Florida by Ch. 199, F. S., relating to intangible personal property, and Ch. 200, relating to tangible personal property, which chapters "are mutually exclusive. Together they purport to comprehend all personal property subject to taxation. Presumably, every item of taxable personal property falls within the scope of one, or the other, of the chapters." (Schleman v. Guaranty Title Co., 153 Fla. 379, 15 So. 754, text 759).

Data processing, calculating, adding, and business machines generally appear to be within the definition of tangible personal property contained in §200.01, F. S., where such property is defined as including "all goods, chattels, vehicles (except motor vehicles), animals, and other articles of value capable of manual possession and whose chief value shall consist of the thing itself and not what it represents." We are informed that many data processing, calculating, adding and business machines in use in Florida are held by their users under lease, loan or other type of contract, but are not owned outright by the users of such machines, which are owned by persons, firms and corporations residing or having their places of business in other states; however, it would appear that such machines actually have their situs or location in Florida.

The general rule is that movable property which has a value of its own, instead of being merely the evidence or representative of value, and which has a visible or substantial existence, is taxable where it is usually or permanently kept. (84 C.J.S. 224, §115). In Arundel Corp. v. Sproul, 136 Fla. 167, 186 So. 679, the Arundel corporation was the owner of certain dredging equipment, including the large dredge Hallandale, used by it in the performance of dredging contracts in Florida, including dredging in the everglades for the everglades drainage district and other governmental agencies. The dredge Hallandale was registered and documented with the collector of customs at the port of Baltimore, Maryland, was brought into Florida sometime prior to Jan. 1933 and was used in dredging in the intercoastal waterway, between Jacksonville and Miami, between Jan. 1933 and May 1934, after which it was brought into the everglades and was used for dredging purposes in said everglades from June 1934 to Dec. 1935. The said dredge being in Palm Beach county on Jan. 1, 1935, it was entered on the Palm Beach tax roll for 1935 and ad valorem taxes were imposed thereon. The Sup. Ct. of Fla., in this case, held that the said dredge had a tax situs in Palm Beach county on said Jan. 1, 1935, and was subject to taxation in said county. The statement is made in Cooley on Taxation, §452, beginning at p. 982, 4th Ed., that, "The situs of tangible personal property is where it is more or less permanently located rather than where it is merely in transit or temporary for no considerable length of time."

The residence or place of business of an owner of tangible personal property is of little assistance in determining the tax situs of such tangible personal property, except in those cases where its use is of a transit nature, such as vehicles and equipment used in transportation. Section 200.08, F. S., makes it the duty of "every person, firm or corpora-

tion and all other fiduciaries owning or having the control, management or custody of tangible personal property" subject to taxation in Florida to return the same for taxation in the proper county.

From an examination of the tax statutes applicable to tangible personal property, and the provisions for seizing the tangible personal property of the taxpayer for delinquent taxes, we reach the conclusion that the applicable statutes contemplate the assessment of the property in the name of its owner, who may or may not be the one making the tax return, and not in the name of the person making the tax return unless he be the owner. Tax returns made by persons other than the owner should specify the name of the owner. Where a return is made and filed with the tax assessor, without designating the name of the owner, or his name otherwise appearing therefrom, the tax assessor would appear to be justified in assessing the property returned in his name, unless the tax assessor be advised the name of the owner of such property. Where the legal title to tangible personal property is tax exempt, leasehold interests therein, within the purview of §192.62, F. S., would appear to be applicable.

From the above and foregoing we conclude that data processing and similar equipment located in this state and used therein by their owners or lessees is subject to taxation in Florida, unless entitled to exemption from taxation by reason of one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. To be entitled to tax exemption under the statutory laws of Florida, property including tangible personal property, must be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes, under the above-mentioned constitutional provisions. Said constitutional provisions have been held to be limitations upon the power of the legislature to provide for the tax exemption of any classes of property except those particularly mentioned classes specified in said constitutional provisions. (L. Maxcy, Inc. v. Federal Land Bank, 111 Fla. 116, 150 So. 248, text 250; State v. St. John, 143 Fla. 544, 197 So. 131, text 134, and subsequent cases). Properties owned by the state and its counties are immune from taxation (Park-N-Shop, Inc., v. Sparkman, 99 So.2d Fla. 571, text 573). Tangible personal property owned by the state and its counties is immune from taxation. This includes data processing and similar equipment. Such equipment owned by a municipality and used for municipal purposes only would appear to be within the exemption provisions of §1, Art. IX, and §16, Art. XVI, State Const. Such equipment owned by one person, firm or corporation, but leased to another, not within the purview of said constitutional provisions, would be subject to taxation under Ch. 200, F. S., to the owner of the said properties. Such properties owned by one person, firm or corporation, but leased to the state, or a county, or a municipality, for use in governmental offices and for governmental purposes, would as to the leasehold interest, be entitled to tax exemption. Only in case the interest of the lessor may be said to be held and used exclusively for one or more of the purposes mentioned in said constitutional provisions would it be entitled to tax exemption.

These observations answer the above-stated question as well as the same may be answered generally.

065-48—May 26, 1965

STATE BOARD OF ADMINISTRATION

INVESTMENT AUTHORITY—LIMITATIONS

To: E. O. Rolland, Director, State Board of Administration, Tallahassee

QUESTIONS:

1. When the state board of administration succeeded to the statutory investment authority of a state agency pursuant to §215.44, F. S., is the investment of the funds of that agency limited to those securities authorized in §215.47, F. S.?

2. What effect does an amendment to the statutory investment authority of an agency, increasing the types of securities eligible for investment, have on the investment authority of the state board of administration after the enactment of Ch. 57-353 (§§215.44-215.54, F. S.)?

Chapter 57-353, presently comprising §§215.44-215.54, F. S., transferred to the board of administration certain powers and duties in relation to certain investments of funds of state agencies. Section 215.44(1), in particular, evidences such transfer by virtue of the following pertinent language:

> (1) *Except where otherwise specifically provided by the state constitution*, the state board of administration, . . . shall have and exercise all rights, powers, jurisdiction, duties, privileges and authority heretofore vested by law in any state department, agency, institution or officer relating to the investment or reinvestment of moneys and the purchase, sale or exchange of any investments or securities of or for any investment funds or investment accounts under the control and management of such departments, agencies, institutions or officers, and required by law to be deposited with the state treasurer. (Emphasis supplied.)

Section 215.47, F. S. contains the restriction that: "Moneys available for investment under §§215.44-215.54 may be invested in the following type of securities *and in no other. . .*" (Emphasis supplied.)

The foregoing quoted language indicates a legislative intent to limit the type of securities in which the board of administration-controlled moneys may be invested. (See letter of July 22, 1957, written by my predecessor in office to the same effect.) It further appears to have been the legislative intent in enacting Ch. 57-353, *supra*, to create one statutory source that would provide a general scheme of regulating the investment of moneys the control of which was placed under the supervision of the state board of administration pursuant to said chapter.

In view of the foregoing, questions 1 and 2 are answered as follows:

AS TO QUESTION 1:

When the state board of administration succeeded to the statutory investment authority of a state agency pursuant to §§215.44-215.54, F. S., (Ch. 57-353, *supra*) investments of the funds of that agency would be limited to those securities authorized in §215.47, F. S., "except where otherwise specifically provided by the state constitution."

AS TO QUESTION 2:

The foregoing conclusion would not preclude the legislature from either amending §§215.44-215.54, F. S., increasing the types of securities, or amending the statutory investment authority of a particular

agency which may be found in some other provision of the statutes provided, in the latter instance, it was clear from the amendment that the legislature intended to supersede or otherwise qualify the limitations contained in §215.47, F. S. In this regard, your attention is invited to the letter of July 27, 1960, written by my predecessor in office indicating that a 1959 amendment to §288.153, F. S., had the effect of superseding the limitation on investments contained in §215.47, F. S. This conclusion was based upon the specific language contained in said §288.153, to wit: "*notwithstanding any other restrictions on investments contained in any other law in this state . . .*" (Emphasis supplied.)

065-49—May 26, 1965

LEGISLATION

SPECIAL OR LOCAL ACTS; ADDITIONAL COUNTY SALES OR USE TAX

To: James H. Sweeny, Jr. and J. Kermit Coble, Representatives, Volusia County, Tallahassee

QUESTION:

May the legislature by local or special act provide local additional sales and use taxes for individual counties, the proceeds of which are to be used for or toward the maintenance and operation of public schools in such county?

This question is substantially the same as that considered by this office in AGO 055-49, Mar. 4, 1955, wherein serious doubt was raised regarding the constitutionality of a sales and use tax embracing less than the entire state insofar as it may involve questions of the equal protection of the laws, which will more fully appear from a copy of the said opinion handed you herewith.

The fact that very few, if any, special and local laws have been enacted, as to gasoline taxes, since Ch. 15659, 1931, now appearing with amendments, extensions and additions, as Ch. 208, F. S., and, as to sales and use taxes, since Ch. 26319, 1949, now appearing with amendments, extensions and additions, as Ch. 212, F. S., seems to indicate a legislative plan to reserve such taxes as state-wide taxes, and not as local taxes, to be used for general instead of local and special purposes. Previous legislative efforts to enact county sales and use taxes have not been successful, and there is grave doubt whether a county sales tax bill, if introduced at this time, could be enacted.

Your question is, therefore, answered in accordance with the comments contained in AGO 055-49.

065-50—May 31, 1965

REGULATION OF VOCATIONS AND PROFESSIONS

USE OF THE WORD "DRUGS" BY RETAIL DRUG ESTABLISHMENTS—PERMIT FOR OPERATION REQUIRED

To: H. F. Bevis, Executive Secretary, Florida Board of Pharmacy, Tallahassee

QUESTION:

Does the use of the word "drugs" by a retail business operation which does not hold a retail drug establishment permit violate the provisions of Ch. 465, F. S.?

An examination of Ch. 465, F. S., with reference to the operation of a retail drug establishment indicates, in my opinion, that the use of the word "drugs" by an establishment which does not hold a retail drug establishment permit constitutes a violation of §465.21(1) and §465.18(1), F. S.

This affirmative answer to your question is based upon the following law and reasoning thereon. Section 465.21(1), F. S., states as follows:

> (1) As a prerequisite to operating a retail drug establishment, all owners and proprietors of retail drug establishments in this state, shall secure from the state board of pharmacy a permit for each such retail drug establishment . . .

If a retail drug establishment is operated without first securing the permit provided for in §465.21, F. S., the operator thereof would then become subject to the violation provisions of §465.18(1) and (5), F. S. This section of the law subjects the violator to a possible fine up to $1,000 or a 6-months prison term, or both, if he is convicted of operating a retail drug establishment which is not registered with the board of pharmacy.

Based on a reading of the above-referred to sections of law, the final conclusion with reference to your question must be arrived at by determining what type of business operation is considered to be a retail drug establishment. In my opinion, the legislature has clearly defined this type of operation in §465.031(1), F. S., wherein it is stated as follows:

> (1) The term 'retail drug establishment' shall be held to include every store, shop, office, hospital, sanitarium, clinic, dispensary, or other place . . .
>
> (b) Which has upon it or displayed within it, or affixed to or used in connection with it, a sign bearing the word or words 'pharmacy,' 'pharmacist,' 'apothecary,' 'drug store,' 'druggist,' '*drugs*,' 'medicines,' 'medicine store,' 'prescriptions,' 'prescription shop,' or any word or words or symbols of similar or like import; . . . (Emphasis supplied.)

From this definition, it can be concluded that when a business operation undertakes to use the word "drugs" in advertising its services it comes within the definition of a retail drug establishment and, therefore, if the said operation had not been issued a retail drug establishment permit it is operating in violation of §§465.18(1) and 465.21(1), F. S.

065-51—May 31, 1965

COURTS

JUVENILES—CONFIDENTIALITY OF CERTAIN INFORMATION AND RECORDS

To: Ben J. Sheppard, Judge, Juvenile and Domestic Relations Court, Miami

QUESTIONS:

> **1. When information is obtained by an officer of the juvenile court or of a county or city law enforcement department in the discharge of his official duty, is the said information considered confidential and privileged?**
>
> **2. Are reports filed by probation officers and social workers which become part of the records of the juvenile court considered confidential and privileged records?**

From the facts you have submitted to me with reference to question 1, it is my understanding that officers of the county juvenile bureau have, in the past, interviewed juveniles who are subject to the exclusive jurisdiction of the juvenile court (see §39.02(1)), and thereafter the question has arisen as to whether or not the information communicated by the juvenile to the officer of the juvenile bureau is admissible in evidence in subsequent civil suits not within the jurisdiction of the juvenile court or whether this information is to be considered privileged and therefore excluded.

The answer to your questions must be arrived at by a consideration of the pertinent provisions of Ch. 39, F. S., relating to juvenile courts and the common law and statutory rules of evidence relating to witnesses which are presently in force in the state.

At common law, there existed two classes of confidential communications, those between husband and wife and between an attorney and his clients and, therefore, communications between these parties cannot be divulged by either without the consent of the other. The legislature, by statute, has declared certain other classes of communications to be privileged and confidential. A determination as to whether or not the relationships which are the subject matter of question 1 are considered privileged must be arrived at by further examination of Florida statutory law.

Section 39.12(4), F. S., reads as follows:

> (4) All information obtained in discharge of official duty by any *judge, counselor, assistant counselor,* or *employee* of any *juvenile court shall be privileged,* and shall *not* be disclosed to anyone other than the authorized personnel of the juvenile court and others entitled under this chapter to receive that information, except upon order of the judge. (Emphasis supplied.)

A reading of this section clearly shows that if information is obtained by any of the persons specifically set out therein in the discharge of their official duties with relation to the juvenile court, then the said information is privileged and cannot be disclosed to anyone without a specific order of the juvenile judge. However, if an officer of the juvenile bureau of the county sheriff's department or the city police department are employees of the county or the city and not of the juvenile court, they would not be within the provisions of the above set out statute and, therefore, information obtained by them in the discharge of their official duties would not be considered privileged under the provisions of the above-quoted §39.12(4), F. S.

If the information secured by the officer of the county or city juvenile bureau is made into a written report and thereafter becomes a part of the official records of the juvenile court, this said record would be considered privileged and could not be admitted in evidence in any subsequent civil or criminal proceeding (see §39.12(6)). Since, however, the oral communications between a juvenile and an officer of the county or city juvenile bureau, who is not an employee of the juvenile court, would not be considered privileged communications, the said juvenile officer would be subject to a witness subpoena and could be required to testify as to the communication he had with the juvenile in question. These communications, however, are subject to any of the other existing exclusionary rules of evidence, such as the hearsay rule, which could be used to prevent their receipt into evidence in any subsequent civil or criminal trial.

Before reaching a conclusion on this point, it must be noted that the legislature, in §39.20, F. S., has declared the purpose of Ch. 39 to

be the protection of children who may violate the letter of criminal laws and otherwise protect children under the age of 17 years. "To this end it is the expressed intent of the legislature that this chapter shall be liberally interpreted and constructed in conformity with its declared purpose." It is the general rule that statutes creating juvenile courts are regarded by courts as progressive, humanitarian and beneficial, and are therefore entitled to favorable or liberal construction (see 31 Am. Jur. 304, §21).

Question 1 refers to a civil proceeding not within the jurisdiction of the juvenile court and to testimony being disclosed by a county or city juvenile officer who is not an employee of the juvenile court. Under these circumstances, it is my opinion that the rule of nondisclosure set out in §39.12(4), F. S., would not apply. However, if there is a local arrangement wherein a county or city law enforcement officer is assigned to the juvenile court and could technically be considered an employee of that court, it is my opinion that the liberal construction requirement placed on Ch. 39 by the Florida legislature should govern and communications with the said officers should not be disclosed to anyone unless the juvenile court feels that it is in the best interest of the child.

On the basis of the foregoing set out law and reasoning thereon, question 1 is answered in the affirmative with reference to persons specifically set out in §39.12(4), F. S., and in the negative with respect to persons not specifically covered by said section.

With reference to question 2, the answer depends on whether the records in question can be considered confidential in character as to warrant the benefit of the rule of privilege which will allow them to be excluded from any court proceeding other than those within the jurisdiction of the juvenile court.

Section 39.12(6), F. S., reads as follows:

> (6) No juvenile court record shall be admissible in evidence in any civil or criminal proceeding in any other court, except that:
>
> (a) Orders permanently depriving a parent of the custody of a child and committing the child to a licensed child placing agency or the state department of public welfare for adoption shall be admissible in evidence in subsequent adoption proceedings relating to the child;
>
> (b) Orders transferring a child to another court for trial shall be admissible in evidence in the other court, but shall create no presumption as to the guilt of the child, nor shall same be read to or commented upon in the presence of the jury in any trial in the other court;
>
> (c) Orders binding an adult over for trial on a criminal charge, made by the judge as a committing magistrate, shall be admissible in evidence in the court to which the adult is bound over;
>
> (d) Juvenile court records forming a part of the record on appeal shall be used in the appellate court in the manner hereinafter provided;
>
> (e) Juvenile court records necessary therefor shall be admissible in evidence in other courts in any case where a person is being tried upon a charge of having committed perjury in testifying in the juvenile court.

If the records referred to in question 2 are part of the official records of the juvenile court and they do not come within the exceptions set out in §39.12(6)(a)-(e), F. S., then it is my opinion that they are not admissible in evidence in any civil or criminal proceeding in any other

court. Therefore, question 2 is answered in the affirmative, subject to the foregoing referred to exceptions.

In conclusion, it must be pointed out, however, that the privilege of nondisclosure of confidential communications or records is a privilege that may be waived by the person in whose favor it exists (see Savino v. Luciano, 92 So.2d 817 (1957), wherein it was so held). It is my opinion, with reference to question 2, that under the law a juvenile judge could waive the privilege of exclusion if he felt that such a waiver would be in the best interest of a child within his exclusive jurisdiction.

065-52—May 31, 1965

FLORIDA INSTALLMENT LAND SALES ACT

CLASSIFIED AS REGULATORY RATHER THAN LICENSING LAW—SERVICE CHARGE BY TREASURER

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the Florida installment land sales board properly classified as an examining and licensing board, as contemplated by §215.37, F. S., and subject to a 10% service charge, or is it within the purview of §215.22, F. S., and subject to only a 4% service charge?

A careful reading of Ch. 478, F. S., convinces one that the said chapter was designed as a regulation primarily to protect purchasers of subdivided real property located in Florida from fraud and deceit in the sale of such property both within this state and in other states and countries. This law was designed to protect those purchasers who purchase lands located in Florida, often from maps and plats exhibited to them in other states and countries, from the fraud and sharp dealings of the owners of such lands or their agents, employees, salesmen and other representatives. Although §478.121, F. S., requires the registration of subdividers and their salesmen, after inquiry, investigation and inspection, as provided in §478.131, F. S., and the payment of a fee as required in and by said §478.131, F. S., such requirements are regulatory in nature and designed primarily for the protection of the buying public, both within and without the state, and is not intended primarily as the licensing of a profession, business or occupation.

There is a clear distinction between the examining and licensing boards mentioned and set out in §215.22, F. S., where the primary purpose of the examination and licensing is the determination of the professional or business ability of the licensee to carry out and perform the requirements of his profession or business, and deals with fraud and deceit of the public only incidentally. Under Ch. 478, F. S., the primary purpose of the regulation of Florida installment land sales, both within and without Florida, is the prevention of fraud and deceit against purchasers of lands and building lots, not the regulation of the professional ability of those engaged in the making of such sales.

The Florida installment land sales act, now appearing as Ch. 478, F. S., is more in the nature of the state racing commission, the workmen's compensation law, the employment security administration, liquefied petroleum gas administration, the state fire marshal and other agencies mentioned in §215.22, F. S., than the professional groups mentioned in §215.37, F. S.

We conclude that the installment land sales board and the Florida installment land sales law are within the purview of §215.22, F. S., and not within the purview of §215.37, F. S.

065-53—May 31, 1965

BURIAL INSURANCE AND CONTRACTS

PRE-NEED BURIAL CONTRACT—DEPOSIT IN BANK IN NAME OF CUSTOMER AND FUNERAL DIRECTOR; LIMITATIONS

To: Mrs. Robbie E. Weaver, Secretary, State Board of Funeral Directors and Embalmers, Jacksonville

QUESTION:

May a person make pre-arrangements for a funeral service with a funeral director in advance of need and further arrange for payment therefor by causing the money to be deposited in a bank or savings and loan association in the name of the person and funeral director with the provision that such person may withdraw the funds at any time, but that the funeral director cannot withdraw the funds until after the death of the person making the deposit and upon performance of the funeral services by the director?

The above question requires examination of §639.09, F. S., which provides that "no person shall receive, hold or manage any funds tendered as payment on any pre-need burial contract until such person is possessed of a certificate of authority, or renewal thereof, issued by the (Insurance) Commissioner . . ." The cited statutory language has as its obvious purposes the prevention of the receipt of money by the person to perform a funeral service in the circumstances where such money may be dissipated and thus unavailable to pay for the funeral service when the time for performance thereof arrives. Thus, the words "receive, hold or manage" appear to be the touchstone of the statutory prohibition.

The statute, of course, does not prohibit an individual from setting aside his own funds for the purpose of paying for funeral services, nor does the statute prohibit a person from depositing his own funds in his own name in a bank or savings and loan association to be paid by such institution to a designated funeral home after his death, and upon the performance by the funeral director of the service. Under such circumstances the person may at any time withdraw the funds or leave them on deposit as he sees fit. The funds are yet his; the funds cannot be said to be received by the funeral director, not held by him or managed by him.

Accordingly the plan outlined in the question propounded may be followed without conflicting with Ch. 639, F. S., and the question is answered in the affirmative.

065-54—May 31, 1965

RETIREMENT

JUDICIAL RETIREMENT SYSTEM—CONSTRUCTION OF §123.10, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are members of the judicial retirement system under Ch. 123, F. S., who served as a justice or judge subsequent to July 1, 1955, but left their office and obtained a refund of their contributions, and who returned to their said office or a like office after said separation from office within a period of 7 years, and the obtaining of a refund of the contributions made by them, entitled to return their contributions refunded as aforesaid, with interest, and receive credit for such prior service?

Specifically, a person was appointed circuit judge on July 9, 1957, and served in that capacity until Jan. 6, 1959, when he was separated from his said office, and elected to have refunded to him the contributions made by him to the retirement system during his said service as a circuit judge. On Dec. 28, 1960, this person was again appointed a circuit judge of Florida and was duly qualified and commissioned as such circuit judge, and is now serving as such judge.

Section 123.10, F. S., provides:

> Any justice or judge whose contributions have been refunded as provided in §123.05 and who subsequently reassumes office as such justice or judge shall be treated as those justices or judges assuming office for the first time as provided herein.

This section originated as §10, Ch. 29838, 1955, and has remained unchanged to the present time. Section 123.05, F. S., permits justices and judges leaving office with less than 10 years of creditable service to leave their contribution in the retirement fund for a period of not more than 7 years, and provides that if they are returned to service within said 7 years such prior service credit may be added to their subsequent service credit. It is specifically provided in §123.05(3), F. S., that:

> Any such judge who fails to resume office as such judge or justice within those seven years shall only be entitled to a refund of one hundred per cent of his contributions to the retirement fund, without interest, and all prior service shall be forfeited should he resume office as such justice or judge at a later date.

The above-mentioned sections of Ch. 123, F. S., appear to adopt a 7 year limitation upon the period of time within which a judge or justice who has been separated from judicial service may return to such service without losing credit for his prior service. Here the only ground for refusing reinstatement in the judicial retirement system is the withdrawing of contributions to the judicial retirement system; a return of such contributions with interest would not appear to be detrimental to other members of the retirement system. Had the contributions been left with the retirement system, credit could be claimed for such service in calculating retirement pay. Equity would seem to dictate that the withdrawal of the contributions as aforesaid should not forever bar reinstatement of such contributions with interest unless there has been a period of time of 7 years or more between separation from office and return to office.

Your question is answered in the affirmative.

065-55—June 15, 1965

See 1965 Amendments to §13, Art. IX, State Const., and §320.081, F. S.

TAXATION

PERSONAL PROPERTY TAX—AUTOMOBILE TRAILERS—CONSTRUCTION OF §200.45, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Should §200.45, F. S., in the light of the supreme court's opinion in Palethorpe v. Thomson, not yet reported, be applied to automobile trailers used primarily for housing purposes?

2. May ad valorem taxes be imposed on such trailers for the tax year of 1965?

3. May house trailers located on real property owned by their owners and used as their permanent homes, be granted tax exemption under §7, Art. X, State Const.?

In substance, §200.45, F. S., provides tax exemption from tangible personal property taxes for automobile trailers bearing a motor vehicle license tag which "shall operate to exempt such trailer from said ad valorem tax assessment." This section should be construed with §320.081, F. S., which provides a special license tag for trailers used for housing accommodations, which license "shall be in lieu of all other taxes and a suitable license plate shall be issued to evidence the payment" of such license taxes. The Sup. Ct. of Fla., in Palethorpe v. Thomson, not yet reported in the Southern Reporter, held said §§200.45 and 320.081, F. S., to be unconstitutional and invalid as to trailer coaches, house trailers or automobile trailers when used primarily for housing accommodations and not for transportation purposes. In brief, the opinions of the Sup. Ct. of Fla., have deemed motor vehicles, within the purview of §13, Art. IX, State Const., to be vehicles operated over the public highways and streets of the state propelled by power other than muscular power. A motor vehicle may consist of a single self-propelled vehicle, or the combination of a self-propelled vehicle and other vehicles attached to it when used primarily for the transportation of persons and property over the highways and streets of the state; such was the case of Wood v. Club Transportation Service, Inc., 143 Fla. 449, 196 So. 843.

Sections 200.45 and 320.081, F. S., having been held invalid insofar as they attempted to exempt from ad valorem taxation trailer coaches, house trailers and automobile trailers used for housing purposes and not primarily used for transportation purposes, the exemption from ad valorem taxes of trailers by said sections must be limited to trailers used in combination with motor vehicles as means of transportation and may not be extended to trailers used for housing purposes. Trailers used for housing purposes, in the light of Palethorpe v. Thomson, *supra*, are not within the purview of said §§200.45 and 320.081, F. S. House trailers, automobile trailers and trailer coaches used for housing purposes are not liable for motor vehicle license taxes, but are liable for ad valorem personal property taxes, unless used under circumstances constituting a homestead within the purview of §7, Art. X, State Const., taxable as of Jan. 1, as other tangible personal properties are taxable.

Sections 200.45 and 320.081, F. S., under the court's opinion may have a field of operation notwithstanding Palethorpe v. Thomson, *supra*, as to trailers used primarily for transportation and not housing purposes, where the enforcement provisions of said §200.45 may be resorted to. Trailers used for housing and not transportation purposes are tangible personal property and not motor vehicles for ad valorem tax purposes. They, like other tangible personal property, should be assessed on the tangible personal property tax roll as of Jan. 1, of the tax year, as is other tangible personal property, which taxes are due and payable as is provided in §200.25, F. S., and collectible as other tangible personal property taxes. Section 200.30, F. S., may be resorted to when it is being removed, or is about to be removed, from the county as provided in and by said section.

We come next to the question of the effective operation of the court's opinion in Palethorpe v. Thomson, *supra*, and whether tangible personal property taxes may be imposed on house trailers used for housing purposes for the tax year of 1965, the opinion in said case having been filed on Jan. 26, 1965, a day subsequent to Jan. 1, 1965, the tax day in Florida. In State v. Greer, 88 Fla. 249, 102 So. 739, text 745, the Sup. Ct. of Fla., said that: "The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the constitution." In State v. Lee, 156 Fla. 291, 22 So.2d 804, text 806, the court remarked that: "There was a presumption that this act, 17178, was constitutional and fully effective from the day it became a law, but this presumption ended when the court unanimously held that it contravened section 16, article III, of the constitution. Then and there it became inoperative, to remain so as long as the decision holding it invalid was maintained." It is stated in 16 C.J.S. 471 and 472, §101, that: "Generally speaking, a decision by a competent tribunal that a statute is unconstitutional has the effect of rendering such statute null and void; the act, in legal contemplation, is as inoperative as though it had never been passed, or as if the enactment had never been written and it is regarded as invalid, or void, from the date of enactment, and not only from the date on which it is judicially declared unconstitutional." The bill of complaint in the Palethorpe v. Thomson case, *supra*, contending that the house trailers therein described were not subject to ad valorem taxation as of Jan. 1, 1964, was not filed until March 11, 1964; nevertheless the Sup. Ct. held the trailers subject to ad valorem taxation as of said Jan. 1, 1964. We do not think that the fact that the opinion in the Palethorpe v. Thomson case was not filed until Jan. 26, 1965, in any way prevents the assessment of house trailers used for housing purposes for 1965 ad valorem taxes. However, we doubt that there should be back assessments of trailers for years prior to 1965.

Under §7, Art. X, State Const., "Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on said home and contiguous real property as defined in article X, section 1, of the constitution . . ." The two requirements for homestead tax exemption are a permanent home located on real property owned by the homesteader. The homesteader must own the legal or equitable title to the lands claimed to be homesteaded by him. A leasehold or other estate in real property for a term of years is not

deemed real property but personal property and will not support an application for homestead tax exemption. The "permanent home" may be a splendid mansion, an ordinary residence, a cottage, a one room cabin, a hovel, a cave, a dugout in the earth or other place of actual residence. There must be a dwelling, in which the claimant makes his permanent home, the land upon which the homestead is maintained; the particular kind of dwelling house is not material, but the premises must actually be used as a permanent home. Water and sewer connections, electrical connections, and other public utility connections are not necessary to constitute a permanent home, although such connections may evidence permanency of home. A one room hovel, or even a cave or tent, may constitute a permanent home, provided the owner is able to show to the satisfaction of the taxing authority, or to the court where the matter is put in litigation, that he is maintaining a permanent home therein. A house trailer may constitute a homestead upon a proper showing that it is located on lands owned by the homesteader (either legal or equitable title) and that it is being used as the permanent home of the homesteader.

Question 1 is answered in the affirmative, unless such trailers and their use conform to the requirements of §7, Art. X, State Const.

Question 2 is also answered in the affirmative when the trailers are not used for transportation or homestead purposes contemplated by §7, Art. X, State Const.

Question 3 is also answered in the affirmative when the requirements of §7, Art. X, State Const. are complied with.

065-56—June 15, 1965

BEVERAGE LAW—ADMINISTRATION

COUNTY ZONING WITH RESPECT TO LIQUOR

To: Alton M. Towles, Attorney, Board of County Commissioners, Gadsden County, Quincy

QUESTION:

> **If the board of county commissioners establishes zones or areas by resolution under the authority of §561.44, F. S., what is the effect of such zoning regulations as to existing businesses operated by vendors holding licenses pursuant to Ch. 561, F. S., within such zones or areas?**

The Sup. Ct. has held that a municipal ordinance prohibiting the location of liquor stores within 1,000 feet of each other was reasonable and did not violate the Florida declaration of rights or the 14th amendment of the U. S. Const., although it imposed additional restrictions upon a liquor business, and the power of the city under §561.44, F. S., to restrict the location of liquor stores could not be questioned unless exercised unreasonably and arbitrarily. Glackman v. City of Miami Beach, 51 So.2d 294.

The state in the exercise of its police power may enact a valid law forbidding the sale of intoxicating liquors in a particular locality. State *ex rel* Dixie Inn v. City of Miami, 156 Fla. 784, 24 So.2d 704. In this same case the court held that an ordinance which prohibited an applicant from engaging in the business of a retail liquor store at a location within 2,500 feet of another licensee did not deprive the applicant of any constitutional right to engage in business.

Where liquor licensees conducted their business within 300 feet of a church or school, provisions protecting vendors who were established within the prohibited area when a subsequent ordinance was passed, were invalid as being arbitrary and discriminatory. State *ex rel* First Presbyterian Church of Miami v. Fuller, 187 So. 148.

A liquor license is not property in a constitutional sense but a pure privilege to engage in the business that would otherwise be unlawful. Holloway v. Schott, 64 So.2d 680.

Inasmuch as a liquor license is not property in the constitutional sense and a licensee accepting a liquor license becomes bound to abide with and conform to the several provisions of the beverage act, he is put on notice that the county officials may zone a particular area of the county at any time as a so-called "dry" section and as long as the resolution establishing such zoning regulations is reasonable, it is valid. See State *ex rel* Hoffman v. Vocelle, 31 So.2d 52.

In light of the above discussion, it is my opinion that county commissioners have the authority to adopt a reasonable zoning ordinance under §561.44(2), F. S., which in effect zones a certain area of the county "dry" and prohibits the sale of intoxicating liquors in said area by existing licensees. However, it must be borne in mind that licenses issued under §561.34(1)(c) and (d), F. S., are not affected by the establishment of the zones or areas referred to above.

065-57—June 16, 1965

TAXATION

TANGIBLE PERSONAL PROPERTY TAX—NEWSPRINT

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is newsprint used for the printing of newspapers tangible personal property subject to taxation under Ch. 200, F. S.?

Newsprint is defined by Webster as "cheap machine-finished paper made chiefly from wood pulp and used mostly for newspapers." Newsprint is usually delivered to the newspaper publishing company in large rolls of sufficient size and shape to be fed into the newspaper printing presses, which presses imprint thereon news items and other material and subject matter making up the published newspaper. This newsprint is produced by paper manufacturers from wood and other types of pulp. Newsprint is an article of value capable of manual possession, the chief value of which consists of the thing (newsprint) itself and not what it represents. This brings the newsprint within the definition of "tangible personal property" contained in §200.01, F. S.

Abstract books and records, phonograph machines, newspapers, tip sheets, gasoline, concrete piling, coal, printing ink, printed or lithographed labels, medicines, and many other tangible things have been held to be tangible personal property. (41 Words and Phrases, Perm. Ed., 148-154). In Verney Corp. v. Peterborough, 104 N.H. 368, 188 A.2d 50, the court held that raw materials held as stock in trade to be used in the manufacture of finished products were taxable as stock in trade.

Chapters 199 and 200, F. S., are complementary. They are mutually exclusive. Together they purport to comprehend all personal property subject to taxation. Presumably, every item of taxable personal property falls within the scope of one or the other of the chapters. Under §16, Art. XVI, State Const., ". . . the property of all corporations . . . shall

be subject to taxation unless such property is held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Under §1, Art. IX, State Const., the legislature is required to "prescribe such regulations as shall secure a just valuation of all property, both real and personal, exempting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes." In Maxcy, Inc., v. Federal Land Bank, 111 Fla. 116, 150 So. 248, text 250; State v. St. John, 143 Fla. 544, 197 So. 131, text 134; State v. Doss, 146 Fla. 752, 2 So.2d 303, text 304, and subsequent cases, the Sup. Ct. of Florida held the above-mentioned constitutional provisions to be "limitations upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself."

Your question is answered in the affirmative.

065-58—June 16, 1965

TAXATION

LIENS OF INTANGIBLE PERSONAL PROPERTY TAXES—OWNERSHIP—RELEASE

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are intangible personal property taxes the property of the state or the state comptroller of Florida in his official capacity?

2. How may such liens be satisfied and who may issue satisfactions of such liens?

Section 199.22, F. S., provides:

> All intangible personal property taxes shall be a lien on all the real and personal property of the taxpayer in the county in which they are assessed from the time they become due. All such intangible personal property taxes shall be a lien upon any and all real estate of the taxpayer in every county from the time that the tax execution is recorded in such other county where the real estate is situated . . . The lien of intangible personal property taxes and tax executions shall be superior to all other liens, except liens for other taxes, state, county and municipal, and prior recorded liens on real estate.

Section 199.23, F. S., provides:

> Every tax execution when recorded in the office of the clerk of the circuit court shall have the force and effect of a recorded judgment at law against the delinquent taxpayer, for the period of seven years after the date the taxes represented by such execution become or became due.

Section 199.31, F. S., requires that intangible personal property taxes be paid into "intangible personal property tax fund" in the state treasury. Intangible personal property is required to be assessed on a separate tax roll. Under §199.15, F. S., intangible personal property taxes are due and payable on Nov. 1 of each year.

"A tax is not a lien even upon the property against which the tax is assessed unless made so by statute." (St. Petersburg v. Fiore, 160 Fla. 106, 33 So.2d 852, text 853 and 854; 84 C.J.S. 180, §585). In this state intangible personal property taxes are state taxes and

not county or local taxes. (§§1, 2 and 5, Art. IX, State Const.). Taxes imposed against real and tangible personal property are county and local taxes and not state taxes. (See above-mentioned §§1, 2 and 5, Art. IX, State Const.). It is stated in 3 Cooley on Taxation, 4th Ed., 2493, §1254, that: "Generally tax officers, boards of county commissioners or the like have no power to compromise a tax, or to release it wholly or in part."

Intangible personal property taxes are assessed by the county assessor of taxes (§§199.04, et seq., F. S.), and are collected by the county tax collector (§§199.14, et seq., F. S.). Such intangible personal property taxes are enforced, when not paid within the time required by law, by the county tax collector, who may issue and enforce tax executions for the collection thereof (§§199.18, et seq., F. S.). Although the state comptroller under §192.31, F. S., is given general supervision of the valuation and assessment of taxable properties and the collection of such taxes, including the promulgation of standard measures of value to be used in assessing property for purposes of taxation, nowhere in the statutes and laws of Florida do we find any authority vested in the said comptroller to release intangible personal property tax liens imposed by §§192.21 and 199.22, F. S. However, we find in the Florida Statutes and laws no express provision authorizing the comptroller to discharge or compromise intangible personal property tax liens. Neither do we find any statute or laws authorizing the comptroller to release intangible personal property tax liens. Section 199.17, F. S., relating to the powers and duties of the comptroller in connection with intangible personal property taxes makes no mention of compromising or releasing intangible personal property tax liens.

Sections 199.18, 199.20 and 199.21, F. S., set out the manner and method of enforcing delinquent intangible personal property tax liens through the issuance of tax executions by the county tax collector. Under §199.23, F. S., tax executions become liens against the property of the taxpayer in other counties when recorded in such counties, which liens may be enforced in such other counties by levy and sale of the properties of the taxpayer encumbered by such liens. Section 199.26, F. S., makes it a continuing duty of the county tax collector to enforce such taxes.

Under §199.22, F. S., the lien of intangible personal property taxes is "superior to all other liens, except liens for other taxes, state, county and municipal, and *prior recorded liens on real estate.*" (Emphasis supplied.)

It appears from your file handed us with your request for opinion that the then owners of a parcel of land in south Miami heights, addition "G," in Dade county, encumbered the same by mortgage, dated April 7, 1958, which was recorded, on April 14, 1958, in Dade county official record book 763, p. 184, to the Washington security insurance co., which mortgage by assignment or assignments now appears to be vested in the Manhattan savings bank, and the title to the real estate in question became vested in diversified collateral corp., against which corporation an intangible personal property tax was imposed for the tax year of 1963. Although it appears from the above recited facts that the said 1963 intangible personal property tax lien is subject and inferior to the said mortgage, which is a superior lien to the said tax lien, we find no authority under the State Const., statutes and laws authorizing you to make and execute a valid release or discharge of the said tax lien. Although we find no statute or law prohibiting the execution and delivery by you of a purported release or discharge of such lien, on the other hand, there is no statute or law authorizing such a release

or discharge. This being true, we must hold that such a release or discharge executed by you would have no basis in law, and would not be binding on the state, the owner and holder of the said intangible personal property tax lien. Although we feel that the lien of the mortgage above-mentioned is superior to the lien of the state's intangible tax for 1963, and that the tax lien may not be at present enforced against the mortgaged property, we find no authority vested in you as comptroller to legally make and execute a release or satisfaction of such tax lien binding on the state.

The letter of April 1, 1965, wherein the statement was made that: "We therefore find no objection to your executing the 'proposed release and disclaimer' attached to the said letter of March 24, 1965," must be read in the context of the said letter, and not out of context. An examination of the said letter shows a tentative view that the lien of the state was an inferior lien to the one foreclosed, so that an execution and delivery of the proposed release and disclaimer would not have in fact released or disclaimed any interest as against the foreclosed title. It was not the purpose and intention of the said letter of April 1 to hold that the comptroller had any authority to release a lien held by the state on a parcel of property. The said letter of April 1, 1965, apparently being subject to a misunderstanding, is hereby withdrawn.

065-59—June 17, 1965

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—UNLAWFUL WEIGHT AND LOAD—INSPECTION—PENALTY—REVIEW

To: F. K. Strickland, Secretary, Weight Review Board, Tallahassee

QUESTION:

Where the gross weight of a vehicle or combination of vehicles traveling on the highways does not exceed the maximum allowable weight under law but the axle weight exceeds the lawful weight by more than 1,000 lbs., what should the fine be for the first 1,000 lbs. under the provisions of §317.801(3)(b), F. S., as amended by Ch. 65-250 (SB 606)?

The controversy here revolves around the question as to whether the fine for the first 1,000 lbs. of unlawful axle weight should be $10 under all circumstances or whether the $10 fine applies only in those instances where the unlawful weight is 1,000 lbs. or less thereby authorizing the 5¢ per pound fine on all excess weight including the first 1,000 lbs. in those cases where the unlawful axle weight exceeds 1,000 lbs.

Section 317.801(3)(b), F. S., as amended, reads:

> (3) Any person who violates the overloading provisions of this chapter shall be conclusively presumed to have damaged the highways of this state by reason of such overloading, which damage is hereby fixed as follows:
>
> * * * * *
>
> (b) Five cents per pound for each pound of weight in excess of the maximum herein provided when the excess weight exceeds one hundred pounds; provided, however, that whenever the gross weight of the vehicle or combination of vehicles does not exceed the maximum allowable gross weight, *the maxi-*

mum fine for the first one thousand pounds of unlawful axle weight shall be ten dollars. (Emphasis supplied.)

In construing statutes legislative intent is the pole star by which we must be guided. Ervin v. Peninsular Telephone Co., Fla., 53 So.2d 647, Smith v. Ryan, Fla., 39 So.2d 281, and Fla. State Racing Comm. v. McLaughlin, Fla., 102 So.2d 574. Where legislative intent is clearly manifest by the language used in its ordinary grammatical sense, the statute must be given its plain and obvious meaning. Brooks v. Anastasia Mosquito Control Dist., Fla. App., 148 So.2d 64; Clark v. Kreidt, 145 Fla. 1, 199 So. 333, and Maryland Casualty Co. v. Sutherland, 125 Fla. 282, 169 So. 679.

Giving the underscored portion of the above-quoted statute its plain and obvious meaning, one logically comes to the conclusion that the maximum fine on the first 1,000 lbs. of unlawful axle weight should, under all circumstances, be a flat $10, for nowhere in the law is it stated or suggested that the fine could be 5¢ per pound on the first 1,000 lbs. in those cases where the overweight exceeds 1,000 lbs. In those cases where the vehicle does not exceed the maximum allowable gross weight but the unlawful axle weight exceeds 1,000 lbs. the fine should be $10 on the first 1,000 lbs. and 5¢ per pound for every pound over 1,000 lbs.

It should be noted in passing that this law became effective upon its passage on June 2, 1965, and is therefore enforceable as discussed herein as of that date.

065-60—June 21, 1965

REGULATION OF PROFESSIONS AND VOCATIONS

SCHOOLS OF COSMETOLOGY—FILING OF SURETY BONDS

To: Juanita W. Saunders, Executive Secretary, State Board of Cosmetology, Tallahassee

QUESTION:

Are schools of cosmetology which were in operation prior to the adoption of Ch. 63-195, required to furnish a surety bond in the amount of $10,000 as required by said chapter?

Chapter 63-195, is a revision of the cosmetology law (Ch. 477, F. S.). Among the changes made in the cosmetology law in 1963 are in the section relating to the requirements for receiving certificates of registration to operate schools of cosmetology. In particular, §3 of Ch. 63-195 amended §477.08(7), F. S., the pertinent provisions of which are set forth:

> Any person, firm or corporation who shall desire to establish a school of cosmetology (except vocational school, and those schools of cosmetology established prior to May 20, 1941), and who shall apply to the board for a certificate of registration to operate such schools, shall at the same time, file with the board *a good and sufficient surety bond* executed by the applicant as a principal and by a surety company as surety in the amount of *ten thousand dollars* and payable to the state. The bond shall be in the form, and shall be signed by a surety company approved by the board and shall be conditioned upon compliance with all laws relative to schools of cosmetology and upon faithful performance of all contracts existing between the school and the students thereof during the life of the bond, whether such contracts be written, oral or implied. Every such bond shall continue in full force and effect for the lifetime of

the school and any bona fide student of the school during the life of the bond may maintain an action against either the maker thereof or the surety thereon or both, and the bond shall be for the purpose of satisfying any judgment which the student may recover as damage for the breach of this contract. (Emphasis supplied.)

Prior to this amendment, §477.08(7), F. S., required the filing of a bond in the amount of $1200. Except for this change in the amount of the bond, the newly-amended subsection (7) is identical in all other respects to subsection (7) as it existed prior to 1963. A reading of the amended subsection (7) indicates that said section is applicable to either newly-established schools of cosmetology or persons applying for a certificate to operate such schools.

According to §477.08(3), F. S., schools of cosmetology must obtain from the board of cosmetology a certificate of registration to operate such schools. Every certificate is also required to be renewed annually. Subsection (7) requires that when applying to the board to establish and operate the school, a surety bond must be filed. Consequently, it would appear that whether a person is establishing a school or applying for a certificate of registration to operate the same from year to year, a necessary prerequisite to the issuance of such certificate is the furnishing of a good and sufficient surety bond. With the amendment of subsection (7), the old $1200 surety bond was replaced by a new $10,000 surety bond; and I am not aware of any provision in Ch. 477, F. S., as amended, which provides for a bond in an amount less than said $10,000.

Chapter 63-195, does not appear to contain any specific provision limiting the application of the $10,000 bond requirement to only those schools of cosmetology established subsequent to the effective date of Ch. 63-195. Section 10 of said chapter which creates §477.29, F. S., and may be referred to as a "savings clause," has the effect of merely preserving certain certificates and regulations which were in force prior to the adoption of Ch. 63-195 and which might otherwise have then been affected as a result of the adoption of the said act.

In summary, you are advised that according to the provisions of Ch. 477, F. S., (both as amended in 1963 and 1965), schools of cosmetology are required to obtain certificates of registration to operate schools of cosmetology and that a prerequisite to obtaining such certificate is the filing with the board of a good and sufficient surety bond which according to the provisions of §477.08(7), F. S., as it presently reads prescribes such bond to be in the amount of $10,000.

Your question is answered in the affirmative.

065-61—June 22, 1965

LEGISLATURE

CONSTRUCTION OF EXCEPTION IN §8, ART. IV, STATE CONST.—LIMITING BUSINESS TRANSACTED AT SPECIAL SESSIONS

To: E. C. Rowell, Speaker, House of Representatives, Tallahassee

QUESTIONS:

1. What is intended by the requirement in §8, Art. IV, State Const., that "the legislature when organized shall transact no business other than that for which it is especially convened . . . except by a two-thirds vote of each house."?

2. At what point in the legislative process is the two-thirds vote required, upon introduction of the legislation or upon its passage?

3. At what point in the legislative process is the two-thirds vote required on legislation received from the other house of the legislature?

4. Does "two-thirds vote of each house" mean two-thirds of the total membership of each house or two-thirds vote of those present in each house?

Section 8, Art. IV, State Const., authorizes the governor to call the legislature into special or extraordinary session, which "legislature when organized shall transact no legislative business other than that for which it was especially convened, or such other legislative business as the Governor may call to its attention while in session, *except by a two-thirds vote of each house.*" (Emphasis supplied.) This section has remained unchanged since the adoption of the State Const., in 1885, which constitution, according to the ordinances of the convention of 1885, became effective on Jan. 1, 1887. This section of the said constitution was the successor to and replaced §8, Art. V, State Const., 1868, which prohibited the consideration by extraordinary sessions of the legislature of legislative business other than that included in the governor's call, "*except by unanimous consent of both houses.*" (Emphasis supplied.) Prior constitutions of Florida, although they made provision for extraordinary sessions of the legislature, contained no limitations on the legislation that might be considered, like or similar to the above-mentioned provisions in the 1868 and 1885 constitutions.

It is not clear from legislative journals prior to 1925 just what the procedures were for compliance with said §8, Art. IV, State Const., although the journals seem to indicate that an attempt was made to comply therewith. The first extraordinary session called under said §8, Art. IV, appears to have been the extraordinary session of the early part of 1889. We find the following expressions concerning the introduction of bills which do not appear to have been within the call, to wit:

> By permission Mr. _____ introduced Senate (or House) Bill No. ____ and The House (or Senate) by unanimous (or two-thirds) vote agreed to consider Senate (or House) Bill No. ____.

In the journals of the 1912 extraordinary session, called under said §8, Art. IV, we find notations that:

> By permission Mr. _____ introduced Senate (or House) Bill No. ____.

Other similar expressions may have been used. These expressions examined did not reveal the vote required by the presiding officer for such permission to introduce, so it is presumed that a roll call vote was not taken. The presumption being that public officers do their duty (Dupuis v. Thompson, 16 Fla. 69 (1877) and subsequent cases), we are left to presume that a "two-thirds vote of each house" was taken. The call of the 1918 session was so broad that a large part of the bills introduced were within the call.

The house journals of the 1929 and 1931 extraordinary sessions called under said §8, Art. IV, seem to have used a fairly uniform entry, after showing the number of the bill offered, that "the introduction of which was agreed to by a two-thirds vote of the House of Representatives." The senate at the 1925 extraordinary session may not have used a uniform entry; however, in numerous instances an entry was made that: "by a two-thirds consent Senator _____ introduced

Senate Bill No. _____." Similar entries were used in the senate journals of the 1929 and 1931 extraordinary sessions, as well as entries that: "Senator _____ was permitted to introduce and have considered Senate Bill No. _____." Many of these entries show or indicate a two-thirds vote. We have also examined the house and senate journals of the 1956, 1957 and 1962 extraordinary sessions, from which it appears that a similar procedure was followed. Throughout the journals above-mentioned are also entries whereupon the bill being offered, the presiding officer ruled it not to be within the governor's call, whereupon the introducer moved the house, or senate, as the case was, for permission of the body to introduce the bill and have it considered, the presiding officer requiring a two-thirds vote thereon.

From the above information reflected by journal entries of extraordinary sessions of the Florida legislature, under §8, Art. IV, State Const., it appears that both houses of the Florida legislature have construed said §8, Art. IV, as requiring legislative permission, where the bill offered was not within the governor's call, as relating to the introduction of the bill, and not to its first, second and third reading that, although jurisdictional, it was procedural in nature. There appears no constitutional requirement that the journal entries of such action of the legislature set out in detail its procedures and take a roll call on its grant of permission to introduce bills not within the call, as is the requirement under §21, Art. III, State Const., as to the evidence of notices to apply for local legislation. "Until proof to the contrary appears (and in this case the legislative journals may be the only available evidence) it is to be presumed that public officers properly perform their duties, and that they carry them out in good faith. It is presumed that public officers know what their authority is under the law and that such laws have been faithfully performed." (13 Fla. Jur. 88 and 89, §81).

Cursory research reveals that Alabama is the only other state having a similar provision in their constitution. Section 76, Art. IV, Ala. Const., provides that when convened "in special session, there shall be no legislation upon any subjects other than those designated in the proclamation of the governor calling such session, except by a vote of two-thirds of each house." The Alabama courts have construed this provision of the Alabama Const., as applicable to the enactment of the bill, including each of its three readings. (Advisory Opinion, Ala., 167 So. 327, and cases therein cited). There seems to be a difference between "legislative business" as used in the State Const., and "legislation" as used in the Alabama Const. The word "legislative" is defined in 52 C.J.S. 1048, as "giving laws and law giving; law making; making, giving and enacting laws; relating to or pertaining to the passing of laws; making, or having the power to make, a law or laws; of, or pertaining to, legislation or the legislature; that makes or enacts laws." Legislation seems to refer to the passing or enacting laws or statutes; legislation is the product of legislative action or business. We feel that there may well be a distinction between legislative business and legislation. "In determining the meaning of an ambiguous constitutional provision (courts) may consider the contemporaneous and practical construction given it by administrative officials and the legislature." (16 C.J.S. 105, §32). In Advisory Opinion, 156 Fla. 48, 22 So.2d 398, text 399, the justices of the Sup. Ct. of Fla., said that: "Our view is that we must give effect to the constitution according to what we deem to be its plain meaning and what the people must have understood it to mean at the time they adopted it." In said 16 C.J.S. p. 109, §33, it is stated that: "The courts will give serious consideration to

a legislative or executive construction of an ambiguous constitutional provision." In Amos v. Moseley, 74 Fla. 555, 77 So. 619, text 625, the court said that:

> The construction placed by the legislature on this provision (§3, Art. III) of the (Florida) constitution is entitled to weight with the courts when there is doubt as to the constitutionality of a law. See also 16 Am. Jur. 2d 267-269, §85, to the same effect.

Generally, a majority of the members of a legislative body will constitute a quorum, in the absence of a constitutional provision fixing the number. (81 C.J.S. 955, §38). Section 11, Art. III, State Const., fixes a legislative quorum at a majority of its membership. The justices, in Advisory Opinion, 12 Fla. 653, advised that a quorum of a legislative house was not less than a majority of the whole number of members of which that house is composed. There are some provisions in the State Const., for example, the provision in §2, Art. III, requiring a vote of other than by a quorum, as provided in said §11, Art. III, for constitutional requirement as to the two-thirds vote referred to in §8, Art. IV, State Const.

From the above and foregoing your questions are answered as follows:

1. The provision in §8, Art. IV, State Const., insofar as it provides that "the legislature (extraordinary) when organized shall transact no business other than that for which it is especially convened . . . except by a two-thirds vote," relates to the matter of taking up the consideration of a bill, as legislative business, and not to the processes of considering and voting on the bill. The requirement is that no legislative business, other than that authorized by the call, may be taken up for consideration without the affirmative vote of two-thirds of a quorum of members of the house before which the bill is offered, or is present by transfer from the other house. A bill outside the call voted on and transmitted by one house to the other may be taken up and considered by the house to which transferred only upon a two-thirds vote of that house.

2. The two-thirds vote, required by §8, Art. IV, State Const., relates to the taking up of a bill outside the call, whether by introduction or by transfer from the other house, and not to the first, second and third votes necessary to the enactment of the bill.

3. This question is answered by our answer to the second question; the two-thirds vote is necessary before the house to which a bill outside the call is transferred from the other may be taken up and considered for the purpose of voting on and passing it in that house.

4. There being no constitutional provision fixing the number of members required to constitute a quorum for purposes of §8, Art. IV, of the State Const., means two-thirds of the members present, there being a quorum of the elected members present, and not two-thirds of the total membership of the house voting.

065-62—June 24, 1965

COURTS

PRESERVATION OF JUVENILE COURT RECORD FORMS

To: S. Strome Maxwell, Attorney, Department of Public Welfare, Jacksonville

QUESTIONS:

1. Is there any requirement that the juvenile court preserve the form designated as JC 1 under §39.12(2), F. S.?

2. If the answer to question 1 is in the affirmative, how long must these records be preserved?

3. If and when these records are destroyed, how should the destruction be accomplished?

Section 39.12(2), F. S., expressly covers the questions which you have posed. For the purposes of this opinion, it is assumed that "Form JC 1" is still in use and that the form provided by the Florida children's commission and approved by the state organization of juvenile court judges has not yet been adopted. The pertinent provisions of §39.12(2), F. S., are as follows:

> (2) The juvenile court shall make and keep records of all cases brought before it, and shall preserve the records pertaining to a child until ten years after the last entry was made, and may then destroy them, except that records of cases where orders were entered permanently depriving a parent of the custody of a child shall be preserved permanently . . .

This language indicates that the juvenile court is under a duty to make and keep records of all cases brought before it and preserve these records until 10 years after the last entry was made; an exception is made in a case where a parent is permanently deprived of the custody of a child, in which case these records must be preserved permanently.

The statute sets up 2 classes of records in the juvenile court, "official" and "social," but no distinction is made as to the time either class of record must be preserved. It is our opinion that both classes of records must be preserved for the time designated by the statute.

The wording of the statute also indicates that "Form JC 1" is a "record pertaining to a child;" therefore, it should be preserved as provided by the statute.

Relative to the destruction of these cards, this question was answered indirectly by AGO 062-56, dated April 20, 1962, wherein it was stated that all "public records" of the juvenile court, with the exception of those permanently depriving a parent of the custody of a child, could be destroyed pursuant to §119.04, F. S., after 10 years from the date of the last entry thereon. Since §39.12(2), F. S., expressly provides that the cards referred to are not "public records," it would seem that the provisions of §119.04, F. S., are not applicable to these cards. Therefore, if the cards are destroyed after 10 years from the last entry, the destruction could be accomplished according to a procedure provided by the juvenile court.

Question 1 is answered in the affirmative.

Question 2, ten years from date of last entry.

As to question 3: Since §39.12(2), F. S., indicates that the form in question is not a public record, no required destruction procedure is laid down in the statutes.

065-63—June 25, 1965

COURTS

JUVENILES—JURISDICTION, JUVENILE COURT

To: T. K. McKnight, County and Juvenile Judge, Bunnell

QUESTION:

What jurisdiction, if any, does the municipal judge of Flagler Beach, Florida, have over juveniles who violate Florida Statutes or laws, or ordinances of the town of Flagler

Beach, within the corporate limits of the said town of Flagler Beach?

The answer to your question must be arrived at by an examination of the relevant sections of the municipal charter of the town of Flagler Beach, and the relevant sections of the State Const., and Florida Statutes which deal with the establishment of juvenile courts in this state, and the defining of the jurisdiction of these courts by the Florida legislature.

The present municipal government of the town of Flagler Beach, exists by virtue of Ch. 63-1334, the same being the municipal charter of the town of Flagler Beach. Section 1, Art. VI, of the said charter establishes a municipal court for the town of Flagler Beach and provides that this court shall be presided over by a municipal judge, who may hold terms of court for the trial of all persons charged with violations of any ordinance of the said municipality and, upon conviction, to impose such penalties as may be provided by ordinance.

Section 13, Art. VI, of the charter of Flagler Beach provides that the city commission may, by ordinance, provide that all juvenile offenders, as defined in the statutes of the state, be tried in the juvenile court, and those who violate city ordinances shall be separately docketed and tried privately before the municipal judge, who shall also be the juvenile judge. However, the title to Ch. 63-1334, contains no provision or expression that would lead one to the conclusion that it may have been intended to set up a municipal juvenile court. Further, the language of §39.01, F. S., shows a clear intent of the legislature that juvenile courts be set up on a county-wide basis or a district "consisting of *two or more* counties." (Emphasis supplied.)

Under §12, Art. V, State Const., the legislature is authorized to create and establish juvenile courts within the state and to define the jurisdiction and powers of such courts and the offices thereof, and to vest in such courts exclusive and original jurisdiction of all or any criminal cases where minors of any age specified by the legislature from time to time are accused. The legislature, by enactment of Ch. 39, F. S., has provided for the enforcement of this section of the State Const., and in §39.02(1)(a), F. S., the jurisdiction of the said juvenile court has been defined by the legislature, wherein it is stated as follows:

> (1) (a) The juvenile court shall have *exclusive original jurisdiction of dependent and delinquent children* domiciled, living or found within the county or district in which the court is established. (Emphasis supplied.)

Pursuant to §12, Art. V, State Const., a "juvenile court" as defined by §39.01, F. S., has been established in the county of Flagler, wherein the town of Flagler Beach is located. The jurisdiction of this court and every other juvenile court in this state has been defined by the legislature, in §39.02(1)(a), F. S., as quoted above.

The question which you have submitted is similar to that considered by this office in AGO 051-230 of July 20, 1951, wherein the question was raised as to whether or not the provisions of Ch. 39, F. S., were mandatory or permissible legislation or, more specifically, must a county comply with the provisions of the said chapter. In this opinion, it was stated as follows:

> . . . The definitions, scope, nature and purposes of the law are so broad, in my opinion, as to deny any presumption that the act is not mandatory; as indicated above, the statute repeals all other material legislation on the subject of juvenile courts, so that unless a county operated under the provisions set forth

therein, there would be nothing in the statute books under which a court could proceed to handle juvenile cases. *The juvenile courts, as defined in this act, have 'exclusive jurisdiction' of dependent and delinquent children; hence, only a court operating under the provisions of this new law would have jurisdiction to adjudicate such cases.* (Emphasis supplied.)

Based on the foregoing, it must be concluded that the municipal judge of the town of Flagler Beach appears to have no jurisdiction over persons under the age of 17 years who violate any Florida Statutes or law. This conclusion is based on the fact that the legislature, in §13, Art. VI, Ch. 63-1334, (municipal charter, town of Flagler Beach), provided that all juvenile offenders, as defined in the statutes of the state, be tried in the juvenile court. It is my opinion that this shows an intention on the part of the legislature that all breaches of state statutes and laws be within the jurisdiction of the juvenile court of the county, and not within the jurisdiction of the municipal judge.

This leaves for further consideration the language of §13, Art. VI, Ch. 63-1334, which provides that persons who violate city ordinances shall be separately docketed and tried privately before the municipal judge, who shall also be the juvenile judge. This provision is limited to violations of municipal ordinances of the town of Flagler Beach and the trial of such violations by a municipal judge of such town. Such provision would appear to be within the jurisdiction and authority of the legislature unless denied it by §12, Art. V, State Const., and Ch. 39, F. S., enacted pursuant thereto.

As stated above, §12, Art. V, State Const., authorized the legislature to define the jurisdiction and power of the juvenile courts. This jurisdiction was provided for in §39.02(1)(a), *supra*. Since by §39.02 (1)(a), F. S., the legislature has provided for exclusive jurisdiction of a "child" (see §39.01(6)) who commits a "violation of the law" and the term "violation of law" as defined by §39.01(12), F. S., includes the violation of a city or town ordinance, we also doubt the authority of a municipal judge to try a person under the age of 17 years for the violation of a municipal ordinance. However, §39.02(1)(a), F. S., provides that if a child has violated a city ordinance relating to the operation of a motor vehicle, the juvenile judge may enter an order certifying the case to the court which would have jurisdiction if the child were an adult. If such an order is entered, it would then seem that the municipal court would have jurisdiction over the case.

Based on the foregoing relevant sections of the Florida law, it is my opinion that the juvenile court, as defined in Ch. 39, F. S., has exclusive jurisdiction in cases involving a violation of any law by a child under the age of 17 years.

065-64—June 25, 1965

MOTOR VEHICLES

LICENSE TAGS—LOST TAG PERMIT

To: Arch Livingston, Motor Vehicle Commissioner, Tallahassee

QUESTION:

Where the motor vehicle commissioner issues a proper, current license tag for a motor vehicle and the said tag, after being attached to the vehicle for which it was issued, is lost or stolen, may the said vehicle be legally operated over the highways of the state under a "Lost Tag Permit," when such

permit has been issued by a county tax collector under direction of the motor vehicle commissioner upon the application of the owner of the said vehicle for a duplicate of the lost or stolen tag and payment of the required fee, pending issuance of the said duplicate tag by the motor vehicle commissioner?

It is provided in §318.03(1), F. S., that the motor vehicle commissioner shall "carry out and administer all laws of the state relative to the registration, re-registration, licensing, and certification of motor vehicles as provided by law."

The motor vehicle commissioner is authorized by §320.06, F. S., to issue a duplicate license tag whenever the original license tag has been lost or stolen.

Whenever a license tag is lost or stolen, a duplicate license tag must be obtained from the motor vehicle commissioner at a nominal fee. During the intervening time between application for a duplicate tag and the issuance of a tag, the motor vehicle commissioner is authorized to issue a temporary "Lost Tag Permit" so that the vehicle operator may legally operate his car during that intervening period.

The tax collector of each county acts as agent for the motor vehicle commissioner according to law in the sale and issuance of original tags for motor vehicles. He receives also requests for the issuance of a duplicate tag where a tag is lost or stolen. Therefore, as agent of the motor vehicle commissioner in accordance with his powers under §§318.03 and 320.06, F. S., a vehicle may be legally operated over the highways of the state under a "Lost Tag Permit" issued by the tax collector until the receipt of the duplicate tag.

065-65—June 29, 1965

TAXATION

ASSESSMENT OF RAILROAD PROPERTY—EXCLUSIVE JURISDICTION BY THE RAILROAD ASSESSMENT BOARD

To: J. M. Lee, Jr., Director, Railroad Assessment Board, Tallahassee

QUESTION:

In preparing the county tax roll, must the county tax assessor accept and use the assessed valuations as determined by the Florida railroad assessment board, according to §195.01(3) and (4), F. S., for the levy of ad valorem taxes on real and personal property owned by railroads?

Section 195.01(3) and (4), F. S., provide the following:

(3) DISTRIBUTION OF VALUE.—The railroad assessment board shall specify the value of such railroad in each county, and the value of the locomotives, engines, passenger, sleeping, parlor, freight, platform, construction and other cars and appurtenances shall be apportioned by the board, pro rata to each mile of main track, branch, switch, spur track and side track.

(4) NOTIFICATION OF VALUE TO COUNTY ASSESSOR.—The board shall notify the county assessor of taxes of each county through which such railroad runs of the number of miles of track and the value thereof, and the proportionate value of the personal property taxable in their respective counties, special school districts, special road districts, and other special districts that may exist.

After considering the question as propounded by you and the above-mentioned section of law, the answer to your question must be given in the affirmative in line with the discussion hereinafter set forth:

At the outset, it is well to point out that the county tax assessor is a constitutional officer as provided by §6, Art. VIII, State Const., and his "powers, duties and compensation shall be prescribed by law." This clearly indicates that the county assessor of taxes, although a constitutional officer derives his powers and duties only from the statutes of the state and accordingly he is bound by the statutes pertaining to the method of taxation prescribed by such statutes.

Historically, the assessment of railroad property has been given distinct classification because of the particular and exclusive purpose to which railroad property is put to use. Because of the unique nature of railroad property a unit system of taxation is in general use throughout the country and has been approved by all courts of last resort, including the Sup. Ct. of the U. S. (See State R.R. Tax Case, 92 U. S. 575, 23 Law Ed. 663; Bloxham v. Consumers Electric Light and Street Ry. Co., 36 Fla. 519, 18 So. 444, 29 L.R.A. 507, 51 Am. St. Rep. 44; Ellis v. Atlantic Coast Line, 68 Fla. 160, 66 So. 1005; Atlantic Coast Line v. Amos, 94 Fla. 588, 115 So. 315; Lee, Comptroller v. Atlantic Coast Line, 145 Fla. 618, 200 So. 71; Columbus Southern Ry. Co. v. Wright *et al.*, 151 U.S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238.)

The question as presented by you has been ruled on directly by the Sup. Ct. of the state in Simpson *et al* v. Loftin *et al* (1948) 33 So.2d 230; wherein the court in ruling on a suit filed by the trustees of the property of the F.E.C. R.R. Co., against Clyde H. Simpson as tax collector of Duval county and another to enjoin collection of taxes levied against tangible and intangible personal property held the following:

> . . . In his report the Master held that the tangible personal properties represented by Item 2 above, were owned and held by the East Coast Railway exclusively for railroad purposes and under the law were assessable by the Comptroller or the Railway Assessment Board. The Chancellor approved the Master's findings and in his final decree voided the assessments, no assignment of error having been based thereon, the Chancellor's decree became final as to this item.
>
> (3) The question of taxability of the item of tangible personal properties being concluded, there remains nothing to be adjudicated but the assault on the assessment of intangible personal properties detailed in items one, three, four and five above. *In our view these items represent properties held and used exclusively for operating purposes and the taxes on them must be assessed and imposed by the Comptroller or the Railroad Assessment Board, and the County taxing authorities of Duval County have no authority whatever to impose taxes on them.* (Emphasis supplied.)
>
> This affirmation is predicated on Section 195.01, Florida Statutes 1941 F.S.A. under which what is commonly known as the unit system for taxing railroad properties was inaugurated. . . .
>
> The act further provides that if such returns are not made to the Comptroller in the manner provided, then the Comptroller, Attorney General and the State Treasurer (Railroad Assessment Board) shall assess the properties from the best information available and specify the value thereof to each county and the value of the locomotives, engines, passenger, parlor, freight, platform, construction and other cars and appurtenances shall be

apportioned by the Comptroller, pro rata to each mile of main track, branch, switch, spur track and side track and the Comptroller shall notify the County Tax Assessor of each county through which such railroad runs, the number of miles of track and the value thereof, and the proportionate value of the personal property taxable in their respective counties, special school districts, special road districts and other special districts that may exist.

(4) The gist of the unit system of taxation as so defined, requires that the value of the railroad system as a whole, be first determined and such value is then apportioned or distributed on the basis outlined to the counties, districts, municipalities, and other governmental units. Its purpose is to treat the physical properties, intangible properties, and capital stock of the railroad as a unit for taxation and to distribute the assessed value thereof to the counties and other units of government in proportion to millage.

These decisions proceed on the general theory that there is nothing in the constitution prohibiting such a method of assessing railroad taxes and that it is the best means yet devised by which fairness and uniformity of assessments may be approached. It would hardly be reasonable to contend that a public service corporation like a railroad company with its lines extending over a multitude of taxing entities with as many theories of taxation should be put to the annoyance and expense of treating with each of them separately. The Federal decisions uphold the unit system on the theory that it is the best method yet devised to promote equality and uniformity of taxation as contemplated by the constitution. Some phase of it has been in effect in this State for more than seventy-five years.

If the railroad company owns leased or rented properties or properties not used in the operation of its railway system, the local taxing authorities may assess and impose taxes on them, *but as to all properties used in and which are essential to its operation, Section 195.01, Florida Statutes 1941, F.S.A., is a complete and exclusive method for taxing them.* The statute withdrew the power to tax such properties from the local taxing entities and placed it in the hands of the Comptroller or railway assessing board, in order that the properties be treated as a unit and taxed as such. (Emphasis supplied.)

In researching the foregoing direct ruling on the question propounded by you we have determined that there is no case which recedes from the opinions above expressed by the court. In another area of research on this matter, we have determined that there has been no amendment to §195.01(3),(4), F. S., other than that adopted by Ch. 57-295, which amendment merely provided that the annual return to be made by railroad companies should be made on or before the first Monday in April instead of the first Monday in March, and the railroad assessment board rather than the comptroller, attorney general and state treasurer is required to make the assessment required in §195.01(2), F. S., of said section of law before-mentioned.

Accordingly, it must be concluded that the railroad assessment board has exclusive jurisdiction for assessing valuations to be used for the levy of ad valorem taxes on the real and personal property owned by the railroads to the exclusion of any other taxing authority in the state and therefore a county tax assessor must accept and use the assessed valuations given him by the railroad assessment board in the preparation of county tax rolls.

065-66—July 2, 1965

RETIREMENT

STATE AND COUNTY SYSTEM—EMPLOYEES OF MILITARY DEPARTMENT—ACTIVE DUTY

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where employees of the military department of the state are ordered to active duty with the armed forces of the U. S. for service school purposes, should they receive credit on such service for the purpose of determining their aggregate creditable service as a state or county employee?

It is provided by §122.02,(4) (a), F. S., that:

> In determining the aggregate number of years of service of any officer or employee (for purposes of retirement under Ch. 122, F. S.) the time of military service between 1939 and 1946 by the employee on leave of absence shall be added to the years of state or county service. Credit for other military service shall not exceed four years . . .

The phrase "credit for other military service shall not exceed four years," appeared for the first time in §2, Ch. 29801, 1955, which act consolidated the prior separate retirement systems provided for in Chs. 121 and 134, F. S., providing separate retirement systems for state and for county officers and employees. Prior §121.02, F. S., relating to county officers and employees, contained the following provision:

> In determining the aggregate number of years of service of any officer or employee the time of military service by the employee (or officer) on leave of absence shall be added to the state (or county) service.

This provision appears to have been amended to some extent in 1953, not material here.

The reference in §122.02,(4) (a), F. S., to credit for military service under leave of absence appears to be limited to service "between 1939 and 1946," and appears to relate to service during world war II. The services of employees of the military department, mentioned in the above question, not being service during said world war II, if creditable at all, must be within the sentence, "credit for other military service shall not exceed four years," quoted from §122.02(4) (a), F. S. This sentence is not a provision for service credit, but a limitation upon credit for service on military duty not during the period of time between 1939 and 1946, that is, during world war II, when service may be claimed under other statutes and laws relating to leaves of absence for military duty. These statutory provisions do not appear to be applicable to the facts stated in the above question.

Sections 115.01-115.06, F. S., provide for leaves of absence from state and county employment for military service "during war between the United States and a foreign government." Section 115.07, F. S., provides for a "*seventeen day*" leave of absence, for state and county employees, who are commissioned officers in reserve units of the military forces during training periods under orders from the military departments of the U. S. (Emphasis supplied.) Sections 250.48 and 250.49, F. S., provide a similar leave of absence for members of the Florida national guard, who are state or county officers or employees, while on training duty under military duty. These leaves of absence seem to be limited to 17 days

under §250.48, F. S., and the period of the annual encampment under §250.49, F. S. These leaves of absence appear to be within the purview of "other military service" under §122.02(4)(a), F. S., above-mentioned and quoted from.

We come next to §§115.08-115.15, F. S., which appear to have been derived from Ch. 20718, 1941, which became effective June 6, 1941, about the time the Florida national guard was called into federal service and shortly before the entry of the U. S. into world war II, and which make provision for leaves of absence for persons called into active duty as officers in the military forces who are state or county employees. These sections seem to contemplate being called into extensive training duties in the armed forces and not the ordinary encampments mentioned in §250.49, F. S., or the 17 days of leave mentioned in §250.48, F. S. Section 115.14, F. S., provides a similar leave of absence for state and county employees called into active military duty.

We are of the view that where an employee of the military department of the state is ordered to active duty with the armed forces of the U. S. for service school purposes, provided such employee is in the military reserve, or is, by said order, brought into and made a part of the military forces of the U. S., reserve or otherwise, he is brought within the purview and intention of §§115.08-115.15, F. S., above-mentioned, and such military service may well be other military service within the purview of §122.02(4)(a), F. S. The military status of the U. S. of today bears a material similarity to that of the said U. S. in 1941, when said sections were first enacted. This is subject to the limitation in said paragraph and subsection, above-mentioned, that military service, other than in world war II, shall not exceed 4 years.

065-67—July 2, 1965

REGULATION OF PROFESSIONS AND VOCATIONS

CHIROPRACTIC—CONSTRUCTION OF §460.07(1), F. S., AS AMENDED BY CH. 65-449, LAWS OF FLORIDA

To: Dr. J. Paul Grant, Secretary-Treasurer, Board of Chiropractic Examiners, Tallahassee

QUESTION:

Is actual class instruction or attendance required in order for a person to be "enrolled" in a college of chiropractic within the contemplation of senate bill 666?

Senate bill 666 passed during the 1965 session of the legislature, amends §460.07(1), F. S. Said amendment provides an additional qualification of applicants for licenses to practice chiropractic by requiring at least 2 years of residence college work. The pertinent portions of said amendment are set forth as follows:

> (g) Has completed at least two (2) years of residence college work, consisting of a minimum of one half (½) the work acceptable for a bachelor's degree granted on the basis of a four (4) year period of study, in a recognized college or university approved by the board; *provided, however, that this requirement shall not apply to any person presently enrolled in a college of chiropractic on the effective date of this act.* (Emphasis supplied.)

The foregoing underlined language was apparently intended to preserve the status of those persons who are enrolled in a college of chiropractic on the effective date of S.B. 666. We are advised that S.B. 666 was presented to the governor after the adjournment of the legislature. The

said bill was neither vetoed nor signed, and became law 20 days after the adjournment of the legislature, or on June 24, 1965 (see §20, Art. III, State Const.; see also AGO 061-91, p. 145). The said S.B. 666 also became effective on June 24, 1965, since the bill contains an immediate effective date provision. Accordingly, any person who is enrolled in a college of chiropractic on or before June 24, 1965, would not be required to fulfill the 2-year education qualification.

Webster's new international dictionary, 2nd Ed., defines the word "enroll" as follows:

> To insert in a roll; to register or enter in a list or catalog or on rolls of court; hence to record;

In ascertaining the meaning of the language used in the statutes, the words used should be given a meaning accorded them in common usage unless a different connotation is expressed in or necessarily implied from context of the statute. Gaulden v. Kirk, 47 So.2d 567. It would appear, therefore, that the word "enrolled" as used in S.B. 666 is synonymous with "registered" or "recorded" and, therefore, would not appear to contemplate actual class instruction or attendance. This conclusion is further substantiated by an analogous situation which arose in Wirth v. Corning, 75 F. S. 817. In the Wirth case the statute with which the court was concerned provided in part as follows:

> No part of the appropriations herein made for the public schools of the District of Columbia shall be used for the free instruction of pupils who dwell outside the District of Columbia: *Provided, That this limitation shall not apply to pupils who are enrolled in the schools of the District of Columbia on the date of the approval of this Act.* (Emphasis supplied.)

The act in question was approved on July 25, 1947. Plaintiffs in the Wirth case were residents of Maryland and had taken certain steps to enroll in May and June, 1947; such steps included the presentation of appropriate high school diplomas; delivery of high school credits; conference with enrollment officer; examination of the accredited status of the applicant; filling out of a questionnaire; final decision as to eligibility; entering name of the applicant in a registration for enrollment book. The plaintiffs in question did not begin the actual attendance in school until Sept., 1947. The U. S. district court concluded that the plaintiffs were enrolled on the date of the approval of the act within the meaning of the word "enrolled" notwithstanding that they had not received actual class instruction prior to approval of the said act.

In summary, it is my opinion that persons who, on or before June 24, 1965, take the necessary steps to register in a college of chiropractic in accordance with the applicable procedures adopted by said college will be deemed to be "enrolled" within the contemplation of S.B. 666, notwithstanding that they may not receive actual class instruction until sometime subsequent to June 24, 1965.

Your question is answered in the negative.

065-68—July 7, 1965

TAXATION

TAX EQUALIZATION HEARINGS— DUTY OF ASSESSOR OF TAXES

To: Haydon Burns, Governor, Tallahassee

QUESTION:

> **What are the duties and obligations of a county assessor of taxes when attending a tax equalization hearing held under §§193.25, 193.27, F. S., etc., especially as to responding to ques-**

tions relating to the equalization of a particular parcel of taxable property, posed to him by the taxpayer or his attorney?

Section 193.25, F. S., requires that the county assessor of taxes complete his assessment rolls "on or before the first Monday in July in every year, on which day such assessor shall meet with the board of county commissioners . . . for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes, of perfecting, reviewing and equalizing the assessment . . ." Under §193.27, F. S., "The boards of county commissioners may equalize the assessment of the real estate or personal property in their respective counties, and for that purpose may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate or item or items of personal property." Though the primary responsibility for the valuation of property for purposes of taxation is vested in the county assessor of taxes, the board of county commissioners, sitting as a board of tax equalization, is given jurisdiction to review the valuations made by the assessor, and adjust them when proper complaint is made and such assessments are found to be out of line with the general valuations of other properties.

Tax equalization in Florida appears to be a procedure set up by the legislature designed to procure equality of taxation as between taxpayers and doubtless was designed to procure due process and equal protection as required by the U. S. and the State Consts.

Under §§193.25 and 193.27, F. S., the primary purpose of equalization of valuations of properties for tax purposes, based upon testimony of witnesses and other kinds of evidence as to the value of the properties in question before the board of equalization, with the county represented by the county assessor of taxes on the one side, and the taxpayers filing complaints on the other. The county commissioners, sitting as a board of tax equalization, act in a quasi-judicial capacity (Lee v. Booker, Fla. 146 So. 546) charged with determining the true value of the property in question from testimony and evidence laid before it. The board of tax equalization may be compared to a court and the county and the taxpayers as parties to litigation. The assessor of taxes and such other witnesses of the county, or the assessor of taxes, may be compared to the witnesses of one party to the litigation and the taxpayers and their witnesses as the other party to the litigation.

We feel that the assessor of taxes when presenting testimony or evidence is a witness for the county, and the taxpayers, being in the nature of witnesses for themselves, as well as witnesses offered by either the county or the taxpayer, should be permitted to cross-examine the opposing party in the general nature of witnesses in court. All such witnesses should respond to cross-examination by the other party so long as such cross-examination is kept within reasonable limits. The chairman of the board of county commissioners, or other presiding officer, should keep such cross-examination within reasonable bounds.

065-69—July 15, 1965

TAXATION

LIABILITY OF FEDERAL GOVERNMENT FOR STAMP TAXES ON CONVEYANCES OF REAL PROPERTY

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are deeds conveying real property in Florida from a mortgagor of such property, or those claiming by, through or un-

der him, to the United States, or one of its agencies, such as the federal housing administration, in satisfaction of the said mortgage and the obligation secured thereby, subject to stamp taxes under Ch. 201, F. S.?

Chapter 201, F. S., imposes documentary stamp taxes against the documents and transaction therein mentioned, against "any person who makes, signs, executes, issues, sells, removes, consigns, assigns or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in this state." (§201.01, F. S.) including a tax "on deeds, instruments or writings whereby any lands, tenements or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser," (§201.02, F. S.) in the amount or amounts provided in said §201.02, F. S. Said Ch. 201, F. S., appears to contain no express exemption of the U. S., and its agencies from the operation of said chapter.

Generally, a state is without jurisdiction or authority to levy a tax against the U. S., or its agency except to the extent permitted by the congress of the U. S. (56 C.J.S. 469-472, §6; 84 C.J.S. 393-398, §207.33; Am. Jur. 334 and 335, §14; 51 Am. Jur. 278-280, 299 and 300, §§218 and 245; 31 Fla. Jur. 53-58, §§165-168).

Although §1714, title 12, U.S.C., authorizes the states and their subdivisions to impose taxes on real property held by the commissioner, we find no congressional authority for imposing taxes on the federal government or its agencies as grantees under deeds of conveyance of real property. This being true, it follows that the above-stated question must be answered in the negative, insofar as the U. S., or its agency, named in the deed of conveyance is concerned, the U. S., and its agencies being immune from state taxation absent congressional consent. The grantor mentioned in the above question in most, if not all instances, would not be an immune or exempt party and would appear to be subject to a documentary stamp tax, unless the deed of conveyance made by him to the U. S., or its agency be an immune instrumentality of the U. S., or its agency.

"It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities." Mayo v. U. S., 319 U. S. 441, 63 Sup. Ct. 1137, 87 L. Ed. 1504, text 1508). In Jaybird Mining Co. v. Weir, 271 U. S. 609, 46 Sup. Ct. 592, 70 L. Ed. 1112, text 1114, the court remarked that: "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." See also 84 C.J.S. 393, *et seq.*, §207, where it appears that the instruments, means or agencies provided by the federal government to entitle it to carry on its legitimate powers and functions may not be interfered with by state taxation. In State v. Green, decided March 24, 1965, but not yet published in the Reporter, it was held that a deed of conveyance from the U. S., or its agency to some other person, firm or corporation, was an instrumentality of the U. S., and as such immune from taxation, against either the U. S., or the maker thereof.

Under these circumstances the payment of a stamp tax under Ch. 201 F. S., is not required as a condition precedent to the recording of a deed of conveyance to the U. S., or its agency, when offered for record by the U. S., or its agency, the federal government not being liable, either directly or indirectly, for documentary stamp taxes upon deeds of conveyance either by them or to them.

Deeds conveying real property in Florida from a mortgagor of such property, or those claiming by, through or under him, to the U. S., or

one of its agencies, such as the federal housing administration, in satisfaction or cancellation of the said mortgage and the obligation secured thereby, are not, as far as the U. S., or its agency is concerned, subject to state documentary stamp taxes, and such a deed of conveyance should be recorded by the proper clerk of the circuit court when presented to him by the U. S., or its agency, without requiring the affixing thereon of documentary stamp taxes.

When such a deed of conveyance is recorded without requiring documentary stamps the clerk should notify the state comptroller, giving him a short description of the deed so recorded, and advising him of its record without the payment of stamp taxes thereof because it was to the U. S., or its agency as grantee and was offered for record by or for the U. S., or its agency. The state comptroller may take such action thereon against the grantor as he may deem advisable under the circumstances for the collection from such grantor of a documentary stamp tax under Ch. 201, F. S.

065-70—July 19, 1965

COURTS

FEE OF COUNTY JUDGE—CRIMINAL PROCEEDINGS—CONSTRUCTION OF §36.20, F. S., AS AMENDED BY CH. 65-479, LAWS OF FLORIDA

To: J. E. Laramore, County Judge, Marianna

QUESTION:

Is the fee of the county judge in criminal actions authorized by §36.20, F. S., as amended by Ch. 65-479, applicable to cases in progress on July 1, 1965, the effective date of Ch. 65-479?

Chapter 65-479, effective July 1, 1965, amends §36.20(1), F. S., to provide a fee of the county judge in any criminal action or proceeding in the county, for all services performed by said judge, the same as that now received or which shall hereafter be received by the clerk of the circuit court for services performed by the clerk in any criminal action or proceeding.

In essence, the effect of said chapter is to provide a flat filing fee for the county judge in criminal actions in county judges' courts in an amount equal to the criminal action flat filing fee authorized the clerk of the circuit court. Significantly, the legislature has not amended §36.21(4), F. S., which provides that §§36.19-36.21—including §36.20(1), as amended—shall not apply to any suit, proceeding or criminal action pending on the day it goes into effect.

Thus, it would appear that in those criminal actions pending in the county judge's court on July 1, 1965, the fee of the county judge is the sum of $7.50, as authorized by §36.20(1), F. S., 1963.

065-71—July 19, 1965

REGULATION OF PROFESSIONS AND VOCATIONS

MEDICAL PRACTICE ACT—INTERNS OR UNLICENSED PHYSICIANS WRITING OR ORDERING PRESCRIPTIONS

To: Ralph C. Dell, Legal Counsel, Hospital and Welfare Board of Hillsborough County, Tampa

QUESTION:

Are interns or unlicensed physicians authorized to pre-

scribe drugs or write prescriptions under the provisions of Ch. 458, F. S.?

A careful examination of the applicable statutes leads us to the conclusion that the writing of such prescriptions would be in violation of §458.15, F. S. We have been unable to find the reference made on p. 1 of your letter wherein you refer to §458.13, F. S., allowing an intern or unlicensed physician working under the supervision of a licensed physician to practice medicine and write prescriptions. Such a provision was formerly contained under §458.13(2)(j)(1953, F. S.); however, this section has since been amended, eliminating such authority. Under §458.13(1), F. S., a person engaged in the practice of medicine is defined as one "who holds himself out as being able to diagnose, treat, operate or *prescribe for any human disease*, pain, injury, deformity or physical condition . . ." (Emphasis supplied.) Under this section of Florida law, the prescribing of medicine by way of a prescription constitutes the practice of medicine. Since such practice of medicine by an unlicensed person is a violation of §458.15(2)(a), F. S., it must be concluded that the writing of a prescription by any unlicensed person amounts to the unauthorized practice of medicine and constitutes a felony under Ch. 458, F. S.

Under §458.13(2), F. S., certain persons are exempted from the provisions of Ch. 458. Unless the persons in question come within one of the exceptions set out in §458.13(2), F. S., any act by them which amounts to the practice of medicine is in violation of the law. It must be further pointed out that under §465.031(2), F. S., a prescription is defined as an "order for drugs or medical supplies written or signed or transmitted by word of mouth, telephone, telegraph or other means of communication by a *duly licensed* physician, dentist, veterinarian or other practitioner, *licensed by the law* to administer such drugs or medical supplies . . ." (Emphasis supplied.) Therefore, a prescription signed by an intern or unlicensed physician would not meet the requirements of the law and a pharmacist could not legally dispense a prescription legend drug pursuant to such a document.

We have been advised by the state board of medical examiners that it is customary for unlicensed interns, resident physicians and unlicensed house physicians, to write orders on persons seen by them in hospitals, while under the direct supervision of a licensed physician. The orders so written in some instances call for prescriptions or other therapy. This order is then referred to the licensed resident physician in charge of the ward, section or staff whose responsibility it is to ratify the recommendations or advice of the unlicensed intern, resident or unlicensed house physician before the orders are carried out. In this regard, your attention is directed to §458.13(3), F. S., which allows the employment of residents, interns, or house physicians in a hospital for a 2-year period, and further provides for an exemption from the 2-year limitations for interns and residents in approved training programs.

In our opinion, this customary practice does not amount to the practice of medicine, and so long as the licensed resident physician in charge of the ward, section or staff signs the prescription which the unlicensed intern, resident or unlicensed house physician recommends, it would not be unlawful for a pharmacist to fill this prescription since it would then become a prescription signed by a duly licensed practitioner. In our opinion, these customary procedures do not amount to the practice of medicine, but rather are a part of the training program which interns and resident physicians must complete.

This opinion is further borne out by Ch. 398, F. S., the uniform narcotic drug law, which provides under §398.08(1), that a physician

may prescribe narcotic drugs while an intern can merely administer them under his direct supervision. Additionally, §859.05 provides criminal penalties for dispensing narcotic drugs, "except upon the written prescription of a *licensed practicing physician.*" (Emphasis supplied.)

Your question is answered in the negative.

065-72—July 20, 1965

PUBLIC LANDS

TITLE TO LANDS ACQUIRED FOR FLOOD CONTROL AND WATER MANAGEMENT DISTRICTS

To: A. O. Patterson, Director, Division of Water Resources, Board of Conservation, Tallahassee

QUESTION:

In whose name should the title to lands acquired with funds appropriated by items 321 and 323, of §1, Ch. 65-135, for land acquisition for the central and southern Florida flood control district and southwest Florida water management district, be taken?

The central and southern Florida flood control district was created and established by Ch. 25214, 1949, (Ch. 25270, 1949, being an identical and companion act), and the southwest Florida water management district, by Chs. 61-691 and 63-659, each of such districts being placed under Ch. 378, F. S., regulating flood control districts and their operations in Florida.

Item 321, §1, Ch. 65-135, the same being the general appropriations act of 1965, appropriates the sum of $2,000,000 for the fiscal year of 1965-1966, and $1,000,000 for the fiscal year of 1966-1967, for land acquisition by the southwest Florida water management district, and the sum of $7,000,000 for the fiscal year of 1965-1966, and $3,000,000 for the fiscal year of 1966-1967, for land acquisition by the said central and southern Florida flood control district.

These districts were set up as state agencies in connection with the cooperative flood control projects carried on by and between the U. S. and the state, in which the state is required to provide canal and other rights-of-way necessary for such flood control projects. The purposes of these districts are similar in nature to the Florida inland navigation district and the Florida ship canal districts, which are charged with the procuring of rights-of-way and spoil areas for the east coast inland waterway and the cross state ship or barge canal and conveying the same to the U. S. for canal purposes. One of the duties of the division of water resources and conservation of the state board of conservation, is the coordinating, administering and enforcing the provisions of Ch. 378, F. S., relating to flood control in this state.

An examination of §378.46, F. S., reveals authority in state agencies, drainage districts, counties, municipalities, etc., to grant rights-of-way and other interests "to any flood control district." In §378.46(2), F. S., we find the statement that: "Land granted or conveyed to said district or dedicated to the purposes thereof, or use rights in said land granted thereto, shall be for the public purposes of said district." In §378.46(3), F. S., we find authority in the named agencies to grant to flood control districts, "such right, title or interest as it may have in said land." Section 378.46(5), F. S., exempts from taxation "any land granted or conveyed to such district (flood control), or dedicated to the purposes thereof."

It is provided in §378.07, F. S., that:

> Any district created under the provisions of this chapter shall have authority to cooperate with the United States . . . and to enter into and make cooperative agreements or commitments as the governing board of said district may determine to be necessary and needful for carrying out the purposes of this chapter and for the benefit of the district . . .

We find nothing in Chs. 373 or 378, F. S., changing the above statutory references to the flood control district with reference to the transfer of title to the district; we are, therefore, of the opinion that rights-of-way, spoil areas and lands for water storage areas, purchased from appropriations made by items 321 and 323 of §1, Ch. 65-135, (the 1965 general appropriations act), should be taken in the name of the applicable district, to be administered in the usual way heretofore followed, and not in the name of the state board of conservation. However, purchases of rights-of-way, spoil areas and lands for storage areas, etc., from funds appropriated by said items 321 and 323, *supra*, should be with the approval and consent of the state board of conservation, or its agent, duly authorized for such purpose, so as to permit proper controls over the said appropriations by or for the said board.

065-73—July 16, 1965

BEVERAGE LAW ADMINISTRATION AND ENFORCEMENT

CONSTRUCTION OF §561.25, F. S.—COUNTY PROSECUTING ATTORNEY AS COMING WITHIN PROHIBITION AGAINST ENGAGEMENT IN SALE OF ALCOHOLIC BEVERAGES

To: Thomas F. Woods, Resident Counsel, State Beverage Department, Tallahassee

QUESTION:

> **Does a county prosecuting attorney come within the purview of an "officer with state police power granted by the Legislature" under the provisions of §561.25, F. S.?**

Section 1.01(8), F. S., states:

> 1.01 *Definitions.*—In construing these statutes and each and every word, phrase, or part hereof, where the context will permit:
>
> * * * * *
>
> (8) Reference to any office or officer includes any person authorized by law to perform the duties of such office.

Section 8, Art. V, State Const., provides in material part that:

> There shall be elected by the qualified electors of said county at the time when the said judge is elected a prosecuting attorney for said county, who shall hold office for four years. His duties and compensation shall be prescribed by law.

Pursuant to said constitutional provision, the legislature has provided for the duties of the prosecuting attorney which said duties are defined in §34.12, F. S., which reads as follows:

> The prosecuting attorney shall prosecute all criminal cases before the county court, and shall sign all informations filed in said court by him, and do and perform all the duties required of a prosecuting office.

By the provisions of §9(5), Art. V, State Const., it is provided in material part that:

> All offenses triable in said court shall be prosecuted upon information under oath, to be filed by the prosecuting attorney . . .

In addition to the prosecuting attorneys provided for by the cited constitutional provision, §125.03, F. S., further provides that the county commissioners of any county, wherein there shall be no county court or criminal court of record or court of record for the trial of criminal causes, shall employ an attorney at law to prosecute all persons charged with the commission of any kind of offense against the laws of the state in or before the county judge's court.

In AGO 058-16, a copy of which is enclosed herewith for your convenience, my predecessor in office held that the purpose of the cited statutory provisions was to prevent law enforcement officers from being connected with licensed premises in such a way as to interfere with or prevent them from enforcing the beverage law in an unbiased or unprejudiced manner. It goes without saying that the violations of the state beverage law frequently come within the class of cases triable upon information duly issued by a prosecuting attorney in the performance of such prosecutor's duties.

Thus, considering the duties of a prosecuting attorney as they relate to the purpose of the statutory proscription embodied in §561.25, F. S., I perceive an unmistakable collision between the cited statute and ownership, direct or indirect, of a beverage license by a corporation of which a county prosecuting attorney is a member, whether such prosecuting attorney is elected under the constitutional provision or employed pursuant to the provisions of §125.03, F. S.

065-74—July 20, 1965

PROBATE

ATTORNEY FEES—CONTRACTS FOR—NECESSITY FOR PETITION TO AND ORDER OF PROBATE JUDGE

To: John T. Graham, County Judge, Sarasota

QUESTION:

> **May an attorney of a personal representative of a decedent's estate contract privately with said personal representative, and receive payment for his services without petitioning the probate court therefor, or do the statutes contemplate that the attorney must apply by petition and secure an order of the probate court on the matter of fees?**

Section 734.01(1), F. S., provides that "a personal representative shall be allowed all necessary expenses and attorneys fees paid in the care, management and settlement of the estate."

A personal representative may contract with an attorney in regard to the fee for services rendered to an estate; however, the determination of whether this fee is reasonable is determined by the county judge. This is provided for in §734.01(2), wherein the statute provides:

> Any attorney who has rendered services to an estate or the personal representative may apply to the court by petition for an order making an allowance for attorneys fees, and, after notice to persons adversely affected, the court shall make such order with the respect thereto as shall be proper.

Thus, it appears that whether the representative is the sole beneficiary of the estate, or one of several beneficiaries, he may not contract

and pay the attorney's fee, without first petitioning as provided for in the statute.

In reviewing the numerous cases concerning attorneys' fees, it appears that the courts recognize that §734.01(2), F. S., is the controlling statute as to the compensation of attorneys.

The court *in re* Gleason's Estate, 74 So.2d 360, stated:

> The rule in this state is that an attorney who has rendered valuable service to an estate or its personal representative may be paid for such services by making application to the appropriate court and showing that his services benefited the estate.

Your question is, therefore, answered by stating that the statutes contemplate that the attorney must apply by petition and secure an order of the probate court on the matter of fees.

065-75—July 20, 1965

HIGHWAYS AND BRIDGES

TURNPIKE AUTHORITY—SETTLEMENT OF CLAIMS FOR ENGINEERING FEES

To: G. Warren Sanchez, General Counsel, State Turnpike Authority, Tallahassee

QUESTION:

May the Florida state turnpike authority consider a circuit court decree awarding equitable damages to a section engineer claimant as sufficient legal authority to negotiate similar type damages with similar type claimants?

Together with your letter there is enclosed a copy of the final decree entered in behalf of the plaintiff in the case of Palmer and Baker v. State Turnpike Authority, *et al.*, case no. 19918 in chancery, entered by circuit court judge Ben C. Willis, Leon county. Additionally, there is provided a copy of the briefs submitted by plaintiff and defendants in said cause.

Review of these documents reveals that the claim in respect to which the authority inquires as to its right to settle, arises out of engineering work performed by various engineering claimants in accordance with the provisions of various contracts for such work entered into by the authority. It further appears that the areas of the turnpike project regarding which the engineering work was performed, lie north of Wildwood, and along the then proposed extension of the turnpike. Of course, such proposed northerly extension was not completed, the turnpike having terminated at its intersection with interstate 75 in the vicinity of Wildwood.

The contracts in question contain the following two pertinent sections:

> Section 10 "Source of Fee Payment"
>
> The Authority anticipates that it will finance construction of the project by issue and sale of revenue bonds. To date, the Authority has not issued any such revenue bond. It is expressly understood that all payments for Section Engineer services performed under this Agreement shall be made solely from the proceeds of revenue bonds when sold by the authority to finance construction of Sunshine State Parkway, Project No. 2, Fort Pierce to Jacksonville; or from other funds, if any, which may be or which may have been legally made available to the Authority for such purpose, and the Authority shall be under no liability under this Agreement to make payments to the

Section Engineer from any other source. The payment of said fees is contingent upon the availability of funds derived from the proceeds of said revenue bonds, or from such other funds as are mentioned in the preceding sentence, and the liability of the Authority is limited thereto.

Section 11 "Authority's Option to Terminate"

In addition to the rights and options to terminate given in Article 4 above, the Authority has the right to terminate this Agreement at its sole option at any time, with or without cause, and to make settlement with the Section Engineer upon an equitable basis as determined by the Authority, which shall fix the value of the work performed by the Section Engineer prior to the termination of the Agreement . . .

Upon determination that the project would not be extended north into the area where the section engineering work was done pursuant to these contracts, the turnpike authority on April 27, 1964, exercised its option to terminate the contract under §11, above cited. It is significant to observe that said §11, expressly provides for settlement with the section engineer upon an equitable basis in the event the authority exercises its option to terminate the agreement. Accordingly, there is no question about the propriety of settlement of the claims on an equitable basis. If a question exists, such question relates to the existence of a fund out of which to pay damages. In turn the "payment fund" question is dependent upon interpretation of §10, of the contract, above cited.

The circuit court in its final decree in the Palmer and Baker case, *supra*, seems to have ruled that the improvement fund created by §5.06, Art. V, of the trust indenture dated Oct. 1, 1961, is a proper fund out of which equitable damages may be paid to contractors in the event of termination of a contract as provided in §11, of the contract. The court's decree, of course, held that the turnpike authority is not required to pay equitable damages until such time as sufficient moneys are allocated to the improvement fund pursuant to the terms of the trust indenture.

In view of the express provision for negotiation of equitable damages upon termination contained in §11, and the circuit court's ruling that the improvement fund is chargeable with the payment of such damages, it would seem that the state turnpike authority may properly negotiate agreements as to the amount of equitable damages to which contractors are entitled upon termination and to pay such damages out of the improvement fund provided for in the trust indenture at such time as the fund has sufficient moneys to discharge those obligations. To negotiate for the settlement of such claims in cases where the material facts parallel those which obtained in the Palmer and Baker case, *supra*, would tend to avoid litigation of questions of law already decided by a court of competent jurisdiction.

I trust the above observations will assist the authority in resolving this problem.

065-76—July 22, 1965

TAXATION

DOCUMENTARY STAMP TAXES—STATUS OF DOCUMENTS EXECUTED AND DELIVERED IN OTHER STATES AND BROUGHT INTO FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are written obligations to pay money, including promissory notes, made, executed and delivered in other states, and

assigned or negotiated by the payee therein to residents of Florida, subject to taxation in Florida when brought into Florida?

2. Where documentary stamp taxes are paid when no such taxes are due, to whom should such taxes be refunded under §215.26, F. S.?

3. Is §215.26(2), F. S., as amended by Chs. 59-181 and 63-271, retroactive so as to be applicable to refundable taxes paid prior to their enactment?

These questions appear to be posed by an application for the refund of documentary stamp taxes paid on numerous documents acquired by the Midland-Guardian Co., mentioned in your request for opinion, some of which are reflected by your file handed us with your said request for opinion. It appears that the said Midland-Guardian Co., was engaged in the purchase of conditional sales contracts, retail installment contracts, chattel mortgages, and other similar contracts, agreements, documents of divers kinds and forms, involving the sale and purchase of goods, wares, merchandise, motor vehicles, house trailers, and other items of tangible personal property, from retail dealers and sellers, as well as others dealing in such goods, wares, merchandise, including motor vehicles, boats and outboard motors, house and other types of trailers and other kinds and types of tangible property, which contracts, mortgages, agreements, etc., in many instances were made, executed and delivered in this state, but in many other instances were made, executed and delivered in other states. Some of these contracts, mortgages and agreements have been executed and delivered in Florida, and others in Texas, Alabama, and other states, the same having been delivered by the maker thereof to a dealer or other payee in the said state or in another state. After the delivery of the said instruments to the dealer or other payee as aforesaid, the same were assigned or negotiated to the said Midland-Guardian Co., and delivered to it, either at its main office in Cincinnati, O., or its area or district office in Pensacola, Fla.

In Plymouth Citrus Growers Ass'n. v. Lee, 157 Fla. 893, 27 So. 415, as it appears from the record and opinion in the said case, the promissory note there involved had been executed by Plymouth in Fla., and delivered by it through the U. S. mail to the Columbia Bank for Co-operatives, a federal agency, in Columbia, S. C. In this case the Sup. Ct. of Fla., held the said promissory note to be subject to the Fla. documentary stamp taxing law (Ch. 201, F. S.). In this case the court remarked that, "The documentary stamp tax is an excise tax on the promise to pay." Under §201.01, F. S., the documentary stamp tax thereby imposed is imposed on the: "person who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, . . ." (in this state) "or for whose benefit or use the same are made, . . . in the state." Said Ch. 201, F. S., should be strictly construed as against the state and liberally for the taxpayer. (Rogers v. Sweat, 113 Fla. 797, 152 So. 432; Lee v. Quincy State Bank, 127 Fla. 765, 173 So. 909; DeVore v. Gay, Fla., 39 So.2d 796).

Before a taxable document, within the purview of Ch. 201, F. S., may be subjected to taxation in Florida it must have been "made, signed, executed, issued, sold, removed, consigned, assigned or shipped . . . in the state," that is, Florida. Statutes of one state as such have no force or effect in another state (Hartford Accident & Indemnity Co. v. City of Thomasville, 100 Fla. 748, 130 S. 7, text 8; 21 C.J.S. 103, §(70)); however, under proper circumstances causes of action which are transitory in their nature arising in the state of the statute may be enforced

by the courts of another state. The state of Florida is without authority to impose a documentary stamp tax upon a document, within the purview of Ch. 201, F. S., which was made, signed, executed, issued, etc., within another state. Section 201.01, F. S., in addition to the imposition of excise taxes on documents made, signed, executed and issued within the state, also makes reference to documents sold, removed, consigned, assigned, or shipped in the state; however, we construe this provision as relating to transactions in connection with the making, signing, execution, and issuance of the taxable document, and not to subsequent transactions in connection therewith.

Documents made, executed and delivered in states other than Florida, and subsequently brought into Florida would not be subject to the Florida Statutes, unless the bringing of the document into Florida was a part of the transaction whereby the instrument was made, signed, executed, issued and delivered. A retail installment contract, chattel mortgage, conditional sales contract, etc., in connection with tangible personal property, made, executed and delivered in another state, subsequently, and not as a part of the original transaction, brought into Florida, would not appear to be subject to taxation under Ch. 201, F. S.

In any transaction in this state concerning documents issued and delivered in another state, in connection with which notes, written obligations to pay money, and other instruments within the purview of §201.08, F. S., are made, executed and delivered, in Florida, such written obligations to pay money, etc., would appear to be subject to taxation in Florida under Ch. 201, F. S., although the original documents and instruments which were the subject matter of such second transaction were not subject to taxation in Florida. The taxable transaction under Ch. 201, F. S., is the creation or making of the taxable document or instrument within Florida, in whole or in a material part. Under the provisions of §201.01, F. S., the tax is imposed on the person, firm or corporation "who makes, signs, executes, issues, sells, removes, consigns, assigns or ships the same . . . in this state." This provision refers to the actual creation and delivery of the instrument, and not to transactions concerning it after it has been made and delivered. Where a conditional sales agreement is made, executed and delivered by the purchaser of a motor vehicle in Florida, to the seller thereof also in Florida, so that the sales transaction is completed in Florida, the sale and delivery of the said conditional sales agreement by the seller to a third person is no part of the original transaction but a separate and independent one, and is not taxable as a part of the original transaction.

Where conditional sales contracts, and other contracts, agreements, documents, etc., within the purview of Ch. 201, F. S., are made, entered into and delivered in other states, by and between a buyer and seller, so that the transaction, as between the said parties is completed in said state, the sale and delivery of the said contract, by the seller to a person, firm or corporation, unconnected and separate and distinct from the parties to the original transaction, such second transaction may not be deemed and considered to be a part of the original transaction, so that if the purchaser of the contract papers of the first contract brings the same into Florida, there has been no "selling, removing, consigning, assigning or shipping the same" in Florida within the contemplation of Ch. 201, F. S., and a transaction involves parties in Florida and in another state, where the said instrument is required to be accepted or approved by someone in Florida in order to become a binding contract, then there may be said to have been a "selling, removing, consigning, assigning or shipping" of the said contract or agreement in Florida within the purview of Ch. 201, F. S., otherwise not.

Under the facts before us it appears that many, and maybe all, of the contracts and agreements made and entered into by and between sellers and purchasers of tangible personal property in states other than Florida, which were purchased by, and brought into Florida by Midland-Guardian Co., were not purchased or brought into Florida by Midland-Guardian until after the original transaction by and between the buyer and seller, had been completed and closed, so that the bringing of the said contracts and agreements had no connection with, nor was it a part, of the said original agreement between the seller and the purchaser.

The above observations, statutes and authorities, answer the first question in the negative; however, care must be taken in this connection as to whether the bringing of the contract papers into Florida had any direct connection with the making of the original contract or agreement and whether it may have been part and parcel thereof.

Section 215.26, F. S., relating to the refund of moneys paid into the state treasury under the conditions and circumstances mentioned in §215.26, F. S., provides that: "The comptroller of the state may refund to the person who paid the same," moneys paid into the state treasury under the circumstances set out in said section. Section 201.01, F. S., has been construed as imposing the taxes provided in and by Ch. 201, F. S., not only upon the person "who makes, signs, executes, issues, sells, removes, consigns, assigns or ships" the documents and instruments mentioned in said chapter within Florida, but also upon the person "for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped" within the said state. (AGO 060-177). We feel that said §201.01, F. S., imposes the primary duty of paying the taxes imposed by Ch. 201, F. S., upon the maker of the instrument, and imposes a secondary duty upon the other party, or person for whose benefit the instrument was made, to pay the said tax if not paid by the maker. Under this rule the primary duty is on the maker to pay the tax, and, in the absence of a showing that the taxes were actually paid by the other party to the contract, the law would seem to raise the presumption that the tax was actually paid by the maker. When an application for a refund, under §215.26, F. S., of taxes paid under Ch. 201, F. S., is made by the maker of the instrument, there would seem to be a legal presumption that the taxes were paid by the maker; however, when the application for a refund of taxes paid under Ch. 201, F. S., is made by a person other than the maker of the document or instrument, the burden is on such applicant to prove as a fact that he, and not the maker of the instrument or document, actually paid the tax. These observations seem to answer question 2.

The time limitations upon the time for filing applications for refunds of moneys paid under §215.26, F. S., contained in §215.26(2), F. S., was construed by the Sup. Ct., in State v. Gay, Fla., 74 So.2d 560, text 562, 46 A.L.R. 2d 1340, as being more in the nature of a statute of limitation, under which any right to a refund is barred if not made within the time mentioned in said §215.26(2), F. S. This limitation from the enactment of Ch. 22008, 1943, (June 10, 1943) was one year until the enactment of Ch. 59-181 (May 18, 1959), when the limitation became 18 months, until the enactment of Ch. 63-271 (June 3, 1963) when it became 3 years.

Question 3 is answered in the negative. Under this question, the limitation, prior to May 18, 1959, was 1 year, from said May 18, 1959 to June 3, 1963, was 18 months, and from said June 3, 1963 to date was and is 3 years.

065-77—July 28, 1965

HORSE AND DOG RACES—BETTING

PRIVATE SALE OF TWIN DOUBLE MUTUEL TICKETS

To: Richard A. Kumble, Supervisor of Racing, State Racing Commission, Miami

QUESTION:

Is the sale of a live twin double mutuel ticket, after the running of the first two races, from one individual to another at a race track illegal?

Section 550.16(7), F. S., pertaining to the purchase or sale of pari-mutuel tickets, reads as follows:

> No person or corporation shall directly or indirectly purchase pari-mutuel tickets or participate in the purchase of any part of a pari-mutuel pool for another for hire or for any gratuity and no person shall purchase any part of a pari-mutuel pool through another, wherein he gives or pays directly or indirectly such other person anything of value, and any person violating this section shall be deemed guilty of a misdemeanor.

The pertinent portion of this section appears to be "no person shall purchase any part of a pari-mutuel pool through another, wherein he gives or pays directly or indirectly such other person anything of value, and any person violating this section shall be deemed guilty of a misdemeanor."

Gambling in the state by way of betting upon horse and dog races through pari-mutuel pools was legalized by the Florida legislature in 1931.

Prior to the legalization of horse and dog betting in Florida, this form of gambling was *malum in se*. However, because of its legalization, it has been regulated by various statutes and is *malum prohibitum*.

It would, therefore, appear that the sale of a live pari-mutuel ticket from the original purchaser to another is not authorized by any act of the legislature but that the same is specifically prohibited as set forth in the above-quoted statute.

Your question is answered in the affirmative.

065-78—July 30, 1965

HORSE AND DOG RACE TRACKS

APPLICABILITY OF CH. 65-435, LAWS OF FLORIDA, (§550.291, F. S.) TO PREVIOUSLY ALLOCATED RACING DATES

To: Louie Bandel, Chairman, State Racing Commission, Miami

QUESTION:

Are the provisions as contained in Ch. 65-435, general laws of Florida, to be construed retrospectively, thereby affecting the previously allocated racing dates apportioned by the Florida state racing commission in 1964?

Chapter 65-435, general laws of Florida, filed in the office of secretary of state June 25, 1965, in its entirety provides as follows:

> Section 1. The Florida state racing commission may annually allocate to the owners of valid outstanding permits under

and by virtue of which greyhound racing and harness racing is now conducted in this state, not less than ninety (90) days of racing, and not more than the number of racing days allocated or permitted to jai alai permittees, plus scholarship days and charity days allowed by law, Sundays excepted and excluded. Provided, however, the racing commission shall not allocate, for any one greyhound, harness or jai alai permittee, less than ninety (90) or more than one hundred and five (105) days of racing, plus scholarship days and charity days, Sundays excepted and excluded. (§550.291(1), F. S.)

Section 2. The provisions of this act are supplemental to Chapter 550. (§550.291(2), F. S.)

Section 3. This act shall take effect immediately upon becoming a law.

In the absence of a clearly expressed legislative intent to the contrary, it is a cardinal rule of statutory construction that every statute will be construed to operate prospectively and will not be given a retrospective effect. Cragin v. Ocean & Lake Realty Co., 135 So. 795, 101 Fla. 1324, affirming 133 So. 569, 101 Fla. 1324, followed in Mabson v. Christ, 134 So. 43, rehearing denied 140 So. 671, 104 Fla. 606. Appeal dismissed Girard Trust Co. v. Ocean & Lake Realty Co., 52 Sup. Ct. 494, 286 U. S. 523, 76 L. Ed. 1267. Applying this principle of law to the provisions of the above act, any extension of dates legally allocated in 1964 prior to the effective date of the above act would be retroactive and contrary to the general rule of statutory construction.

It is the duty of the Florida state racing commission, in exercising its discretion of apportioning racing dates, to fairly and impartially allot an equal number of days to each track. State v. Rose, 165 So. 60; State v. Stein, 178 So. 133. An abuse of discretion on the part of the state racing commission in properly allocating the assignment of racing dates in 1964 would not appear to have any effect upon the provisions of the above statute inasmuch as its effective date is June 25, 1965. Any judicial determination that the assignment of the dates in 1964 was not fairly or impartially done would merely have the effect and result of causing a reassignment under the existing laws prior to the effective date of the above statute.

It is therefore my opinion, based on the aforesaid statute and cases, that Ch. 65-435, general laws of Florida, should be construed to operate prospectively from the date of June 25, 1965, and that it does not permit the extension of any racing dates lawfully allocated by the state racing commission in 1964. Your question is answered in the negative.

065-79—August 2, 1965

DRIVER'S LICENSE

SUSPENSION BY COURTS PURSUANT TO CH. 65-175, LAWS OF FLORIDA, NOT AUTHORIZED

To: N. David Korones, Prosecuting Attorney, Clearwater

QUESTION:

Is a court having jurisdiction over traffic offenses and arrests authorized under §322.27, F. S., as amended in 1965, to suspend a person's driver's license?

Section 322.27(1)(f), F. S., as amended in 1965, entitled "Authority of department to suspend or revoke license," reads as follows:

(1) The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing of its records or other sufficient evidence that the licensee:

* * * * *

(f) Has been convicted in any state or municipal court having jurisdiction over offenses committed under this chapter or any other law of this state regulating the operation of a motor vehicle on the highways upon recommendation when the court feels that the circumstances surrounding the conviction warrant the suspension of the licensee's driving privilege.

Section 322.01(11), F. S., provides that any reference to "department" shall be construed as referring to the department of public safety. Thus, the reference in §322.27(1), F. S., to the department must be construed as meaning department of public safety.

Section 322.27(1)(f), F. S., provides that a court having jurisdiction of traffic offenses may, when it feels the circumstances surrounding a conviction warrant it, recommend to the department of public safety that the licensee's driving privilege be suspended. This recommendation of suspension by the court may be in lieu of or in addition to any sentence imposed by the court.

A driver's license in the state is a privilege. Its suspension is for the protection of the public and not as punishment to the offender. See Thornhill v. Kirkman, 62 So.2d 740; Smith v. City of Gainesville, 93 So.2d 105.

Section 322.26, F. S., provides and enumerates the conditions upon which the department of public safety shall revoke a license or driving privilege. The provisions in this section are mandatory requirements as opposed to permissive authorization contained in §322.27, F. S.

Upon the conviction of a person under the enumerated conditions of §322.26, F. S., the court shall under §322.25(1), F. S., require the surrender to it all operator or chauffeur licenses held by the person convicted. The license together with a report of conviction shall be forwarded to the department of public safety.

Section 322.25(2), F. S., provides that all state and municipal courts having jurisdiction over traffic offenses committed under the provisions of Ch. 322, F. S., or any other traffic laws of the state shall forward to the department of public safety a record of conviction. It further makes it mandatory that the trial court suspend or revoke the driver's license in accordance with the provisions of Ch. 322, F. S. This suspension or revocation on the part of the court is in the capacity of a ministerial function and is totally void of any discretion. In the case of Smith v. City of Gainesville, *supra*, the court in pointing out that suspensions pursuant to the provisions of §322.26, F. S., are administrative remedies for the protection of the public in which the trial court has no discretion, said at p. 107:

> When made mandatory by statute, the actual revocation of the license is a mere ministerial or administrative function as distinguished from the exercise of judicial discretion. See Emmertson v. State Tax Commission, 93 Utah 219, 72 P. 2d 467, 113 A.L.R. 1174. In revoking the license of the offender, the municipal judge merely follows the mandate of the statute as the administrative representative of the State Department of Public Safety at the municipal level. He has no discretion to exercise. Bartels v. State, 156 Fla. 535, 24 So. 2d 40. He is in no sense a State officer. The statute merely imposes this additional duty upon him as an administrative detail supplementary to his

> judicial functions as a city judge. We find no constitutional objection to the statutory imposition of such duties on a municipal official.

Thus, when §322.25, F. S., is construed in connection with the provisions of §322.26, F. S., the trial court is compelled to suspend a person's driver's license upon conviction for any of the enumerated offenses in §322.26, F. S.

The provisions contained in §322.27(1)(a)-(e), F. S., clearly enumerate the conditions upon which the department of public safety is authorized to suspend a driver's license. Section 322.27(1)(f), F. S., gives the trial court hearing the offense authority to recommend a suspension when it deems the facts surrounding the conviction are of such a severe and grave nature as to warrant it. The court's recommendation must be forwarded to the department of public safety for its consideration. The department of public safety may or may not in its discretion honor the recommendation.

Therefore, in view of the above statutes and decisions, the provisions of §322.27(1)(f), F. S., as amended in 1965, do not authorize a court having jurisdiction of traffic offenses to suspend a person's driver's license, your question is answered in the negative.

065-80—August 2, 1965

REGULATION OF TRADE, COMMERCE, INVESTMENTS AND SOLICITATIONS

SALE OF MONEY ORDERS ACT (CH. 560, F. S.)— CONSTRUCTION OF TERM "NET WORTH PLUS LONG TERM DEBT"

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

> **What is the meaning, intent and purpose of Ch. 65-174, §4(1), (§560.04(1), F. S.) and especially the phrase, "The applicant's net worth plus long term debt shall be at least one million dollars?"**

The 1965 legislature enacted Ch. 65-174, referred to as the "Sale of Money Orders Act." Section 4 of said act sets forth certain requirements which must be met by applicants seeking to be licensed to sell money orders in this state. Chapter 65-174, §4(1), (§560.04(1), F. S.) contains the following requirements:

> The applicant's net worth plus long term debt shall be at least one million dollars computed according to generally accepted accounting principles, provided that applicant's net worth shall be at least five hundred thousand dollars.

The foregoing subsection contemplates that an applicant's "net worth" plus "long term debt" shall be at least $1,000,000, of which at least $500,000, shall represent the applicant's "net worth" only. This simply means that in order to satisfy the $1,000,000 requirement, "long term debt" can be computed together with the "net worth" in making up this amount so long as the "net worth" is at least $500,000.

The term "net worth" is generally understood to mean the value of one's assets less his liabilities. (Castelli v. Tolibia, 83 N.Y.S. 2d 564).

We have been unable to ascertain the exact definition of the phrase "long term debt." This phrase is discussed to some extent in Principles of Auditing by Meigs, 1953 Ed., p. 384 as follows:

> Long-Term liabilities are those obligations of a company which will not fall due within the coming operating cycle *and which are not to be liquidated from current assets.* As commonly applied, the term describes liabilities having a maturity more than one year from the date when they were created or assumed. Obligations of this type are also called "funded debt," "fixed liabilities," "capital liabilities," or "*long-term debt.*" They form part of the relatively permanent capital structure of the business and often remain outstanding over a long span of years. They may be secured by liens against any of the company's real or personal property; or they may be unsecured with no collateral whatsoever. (Emphasis supplied.)

Whatever type of obligation the phrase "long term debt" is intended to encompass, it appears to have been the legislative intent that such obligation could be considered in ascertaining whether the $1,000,000 requirement set forth in Ch. 65-174, §4(1), has been met. The important point to observe is that the applicant's "net worth" must be at least $500,000. In other words, any "long term debt" incurred must be independent and separate and distinct from the "net worth" requirement. Consequently, it makes little difference what the amount the "long term debt" may be so long as it, together with the "net worth," equals at least $1,000,000 and, further, that the said "long term debt" in no way impedes, effects or diminishes the $500,000 "net worth" requirement.

It should be further noted that after satisfying the foregoing requirement contained in Ch. 65-174, §4(1), a licensee is required to "*at all times* have and maintain the qualifications required by this act for the granting of an original license . . . and shall maintain said . . . securities in the amount prescribed by this act." (See Ch. 65-174, §8(1), *supra*). (Emphasis supplied.) The state banking commissioner is authorized to ascertain whether this requirement is being continually maintained and is further authorized, pursuant to appropriate procedures to revoke a license for failure to comply with the foregoing provisions of Ch. 65-174. (See Ch. 65-174, §8(3) and §13 *supra*). (§§560.08(3) and 560.13, F. S.)

Your question is answered accordingly.

065-81—August 2, 1965

PUBLIC SCHOOLS

PUBLIC SCHOOL CONSTRUCTION—MUNICIPAL REQUIREMENTS NOT ENFORCEABLE—REGULATION BY STATE BOARD OF EDUCATION

To: Wm. Reece Smith, Jr., City Attorney, Tampa

QUESTIONS:

1. Can a municipality require public school officials to meet the standards and provisions of a municipal fire prevention code as the same applies:
 a. To existing public school buildings and
 b. To public school buildings to be constructed when the municipality's standards are more stringent than those set forth in Ch. 235, F. S.?
2. If the answer to question 1 is in the negative, what duties and responsibilities do municipalities have in connection with fire prevention and protection as far as public schools are concerned?

Attorney general's opinion 047-289, on questions somewhat similar to yours, reached the conclusion that: ". . . the minimum standards set up in the school code were never intended to be exclusive; that they merely set up a minimum less than which is never permissible; and that while such statutory minimum standards must be complied with in all cases, they do not exempt school boards from compliance with additional and reasonable municipal building code regulations which are designed for the safety, health and welfare of the occupants of the buildings, as well as the public generally in that particular community."

A somewhat different conclusion was reached on a similar question in AGO 058-67 wherein it was stated:

> Generally speaking, the state is not subject to legislative enactments of a municipal corporation and the property of the state and its agencies is free from municipal direction. (Ky. Institution for Ed. of Blind v. Louisville, 97 S. W. 402, 123 Ky. 767, 30 Ky. L. 136, 8 L.R.A., N.S. 53; 62 C.J.S., Municipal Corp., §159; 9 Am. Jur., Bldgs., §6.)
>
> This rule has been accepted in most jurisdictions, particularly in connection with construction of school buildings, because in many states, as in Florida, the requirements for the construction of school buildings are laid down by general statutes. (See Ch. 235, F. S.)

The latter conclusion was adhered to in AGO 058-119, in which the following was added:

> When a state has established its own building code for school buildings, I do not believe a municipality has legal authority to interfere by ordinance unless the city's charter specifically grants it such authority . . . 'The state is not bound by the provisions of a municipal charter or ordinance unless it is mentioned . . . specifically or by necessary implication.' Ex parte Means, (Col. 1939) 93 P. 2d 105 . . . unless there is a clear showing of a defect in the plans approved by the state for school construction which is of such a serious nature that the health and safety of the occupants of the building and public generally would be endangered, a municipality (unless specifically authorized by its charter) has no authority to interfere with said state-approved plans. (See also AGO 062-41, in accord with the above.)

I see no reason to recede from the conclusions reached in the latter 3 attorney general's opinions cited above.

Question 1, both a. and b., is therefore answered in the negative.

As to question 2, I am of the opinion that the better course would be for the municipality to advise the state board of education precisely wherein the minimum standards set by that board fail to provide adequate protection of the public health, safety and welfare. Under provisions of §235.26, F. S., as amended 1965, the state board of education is required to ". . . prescribe regulations providing minimum standards for the construction of school buildings (which) shall have the force and effect of law. . ." Although this statute makes no direct provision concerning fire prevention, it is clearly the legislative intent that such matters could properly be included within the minimum standards required.

065-82—August 2, 1965

CRIMES—OFFENSES IN CONNECTION WITH BUILDINGS

OUTDOOR BURNING OF LEAVES IN CONTAINER NOT IN VIOLATION OF §823.02, F. S.

To: Broward Williams, State Treasurer and Fire Marshal, Tallahassee

QUESTION:

Is the burning of leaves, cuttings from bushes, hedges, papers, etc., in a steel barrel or other metal barrel, or in an outdoor fireplace, a violation of §823.02, F. S.?

In AGO 058-10, addressed to the late J. Edwin Larson, your predecessor in office, it was noted that the provisions of §823.02, F. S., which provide as follows:

> Whoever is concerned in causing or making a bonfire within ten rods of any house or building, shall be punished by fine not exceeding twenty dollars, or by imprisonment not exceeding one month.

could not be waived by public officials. Hence, volunteer fire chiefs acting under the authority of Ch. 633, F. S., would not be authorized to issue permits to private citizens to build bonfires within ten rods of any building.

Inasmuch as your present inquiry relates to the burning of leaves, vegetation clippings and other refuse in outdoor fireplaces or other container, we have serious doubt that such burning comes within the accepted definition of a bonfire as defined in Webster's new collegiate dictionary, to wit: "A large fire built in the open air." The degree of conflagration appears to be the controlling factor.

This rationale was apparently recognized in Botticelli v. Winters, 7 A. 2d 443, 444, 125 Conn. 537, where it was held that "Under ordinance forbidding kindling of 'bonfire' within 25 feet of a building and providing for guarding of bonfires, word 'bonfire' signifies a fire built in open air and ordinance does not outlaw incinerators in open yards within city limits."

It is our opinion that the limited burning reflected in your inquiry is without the purview of §823.02, F. S. Your question is answered in the negative.

065-83—August 5, 1965

TAXATION

METHOD OF FIXING MILLAGE IN YEAR OF REVALUATION—CONSTRUCTION OF §193.03, F. S.—SCHOOL BOARDS

To: State Association of County Commissioners, Tallahassee

QUESTIONS:

1. Do the provisions of §193.03, F. S., as amended, requiring a reduction in millage proportionate to the increase of the general level of assessed value over the preceding year, apply to school boards of the several counties where the reassessment program takes place subsequent to Jan. 1, 1965, thus involving the 1965 tax roll upon which the budget for the 1965-1966 year is based?

2. If the previous question is answered in the affirmative, what is the effect of a trustees' millage election held in 1963 authorizing 10 mills which, together with the school board millage, totals 20 mills?

Section 193.03, F. S., as amended by §8 of Ch. 63-250, requires that during the fiscal years of 1963-1964 to 1972-1973, in those counties where general revaluations of taxable properties have been made during such period of time, millages of the previous tax year be reduced in proportion to the increase of the general valuation of the taxable property in the county.

We are advised that §193.03, F. S., was amended at the 1965 regular session of the Florida legislature; however, it appears that said amendment will not become effective until Jan. 1, 1966. Accordingly, the provisions of §193.03, F. S., as amended in 1963 are the applicable law to be used in the preparation of the 1965 tax roll for the 1965-1966 fiscal year and said section as amended in 1963 will continue in operation until the effective date of Ch. 65-258, which we are advised will be on Jan. 1, 1966 when the provisions of the said 1965 act will become the controlling law.

It is important, however, that we reemphasize certain conclusions reached in AGO 065-35, dated March 30, 1965, in order to ascertain to what extent §193.03, F. S., as amended in 1963 will be applicable for the 1965-1966 fiscal year. As pointed out above, in addition to the requirement for millage adjustments consequent upon general valuation increases, the said section as amended in 1963 contained controls applicable to increases of the basic millages determined as aforesaid, and provided certain rules and regulations concerning millage increases, one of not more than ten per cent and the other of not more than an additional five per cent, making such rules and regulations applicable only to the budgets for the 1963-1964 and 1964-1965 fiscal years. Taxes for the 1963-1964 fiscal year were imposed on the 1963 tax roll, and for the 1964-1965 fiscal year on the 1964 tax roll. The current tax roll will be the 1965 tax roll and will impose taxes for the 1965-1966 fiscal year. These limitations do not appear to be applicable to the 1965-1966 fiscal year or the 1965 tax roll.

Accordingly, after the running of the two fiscal years (1963-1964, 1964-1965) the question of increased millages reverts to Chs. 193 and 237, F. S., as discussed in AGO 065-35.

Your question is therefore answered accordingly.

The second question poses the application of §193.03, F. S., as now constituted, as well as after its 1965 amendment, applicable Jan. 1, 1966, to millages heretofore established by elections held under and pursuant to §10, Art. XII, State Const., which section, insofar as here material, provides that the Florida legislature may: "provide . . . for the levying and collection of a district school tax, for the exclusive use of the public free schools within the district, whenever a majority of the qualified electors thereof that pay a tax on real, or personal property, shall vote in favor of such levy." Generally, where a tax is imposed by the constitution, the legislature has no jurisdiction over the same and may not make any change therein. Doubtless the qualified electors, as above defined, voting at an election under said §10, Art. XII, State Const., measured their vote for the millage tax by the then levels of assessed values to true or just possibilities of an increase in the level of assessed value to true or just value of their taxable properties. It may be presumed that had they had information that such levels of assessed value to true or just value would be increased in the near future they might not have voted the millages that they did vote. Doubtless they were voting

on the levels of expenditures then being used and not on increases in valuations not then foreseen. Under these circumstances, we feel that the courts might well be expected to uphold a statute requiring an adjustment of the millages voted under such circumstances, notwithstanding they were fixed and determined in accordance with §10, Art. XII, State Const., upon the rules of equity applicable by the courts of equity in this state. We are not inclined to construe said §10, Art. XII, State Const., as prohibiting an equitable adjustment of millages, adopted under and pursuant thereto, when by reason of a general revaluation of the taxable properties of the county the millages voted will produce tax incomes beyond the reasonable expectations of those taxpayers and electors who voted the said millages. We feel that such millages may be adjusted, under and pursuant to rules and regulations adopted by the legislature applicable in case of greatly increased levels of tax valuations. We do not deem §193.03, F. S., as amended in 1963, as well as the 1965 amendment not yet effective, to be void and inoperative by reason of §10, Art. XII, State Const., and deem said §193.03, F. S., to be applicable, insofar as millage adjustments are concerned, notwithstanding §10, Art. XII, State Const., unless and until the question is finally determined by the courts.

065-84—August 5, 1965

STATE OFFICERS AND EMPLOYEES

LIMITATION ON SALARIES UNDER PROVISION OF §282.051(6), F. S.—MEMBERSHIP ON SANITARIANS' REGISTRATION BOARD

To: Wallace W. Henderson, State Budget Director, Tallahassee

QUESTIONS:

1. Does §282.051(6), F. S., preclude a regular state employee from serving as a member of the sanitarians' registration board?
2. Does §282.051(6), F. S., preclude the state health officer from serving as a member of the sanitarians' registration board?

AS TO QUESTION 1:

The 1965 legislature enacted Ch. 65-367 relating to legislative spending philosophy which amends several provisions of Ch. 282, F. S. Section 282.051(3)(e), F. S., as amended provides:

> No person employed by the state may fill more than a total of one full time equivalent established position, or receive compensation simultaneously from any appropriation other than appropriations for salaries, or receive compensation simultaneously from more than one state agency unless approved by the budget commission during each biennium. *The provisions of this paragraph shall not apply in those instances covered by the provisions of subsection (6)* of this section. (Emphasis supplied.)

Section 282.051(6), F. S., provides:

> The provisions of subsection (3)(e) of this section shall not apply to an individual filling a position, the salary of which has been specifically fixed, or limited, by law. Unless specifically authorized by law, an individual filling or performing duties of a position, the salary of which has been specifically fixed, or limited, by law, shall not receive compensation from more than

one appropriation, nor in excess of the amount so fixed, or limited, by law, *regardless of any additional duties performed by him in any capacity or position.* (Emphasis supplied.)

Paragraph (e) above appears, in essence, to preclude a state employee from receiving compensation simultaneously from more than one state agency unless budget commission approval is first secured. On the other hand, subsection (6) above appears to go a step further by making the provisions of paragraph (e) inapplicable to any person who is filling a position the salary of which has been specifically fixed or limited by law. In this latter instance such person would be precluded from receiving compensation simultaneously from more than one state agency or in excess of the amount fixed by law unless authorized by law.

The possible application of subsection (6) to the instant situation is occasioned by the language contained in §491.03(4), F. S. The said subsection (4) refers to moneys to be paid to members of the sanitarians registration board as follows:

> Members of the board shall receive *ten dollars per day,* or any part of a day, *while attending official board meetings* and shall receive per diem and mileage as provided by law. (Emphasis supplied.)

It is to be noted that the "ten dollars per day" referred to above is considered to be "compensation for services" as distinguished from "reimbursement for per diem and mileage" (see AGO 053-139, biennial report p. 355).

Accordingly, we are now faced with the question of whether the "ten dollars per day" while attending official board meetings is to be interpreted as constituting a "salary . . . which has been specifically fixed, or limited by law" within the contemplation of §282.051(6), F. S.

At the outset it is well to point out certain principles of statutory construction which we feel are pertinent. "Every statute must be construed *as a whole* and the legislative intent determined, if it be possible, from what is said in the statute. . ." (Emphasis supplied.) Vocelle v. Knight Brothers Paper Co., 118 So.2d 664, 667 (1960). The courts favor a rational and sensible construction where the meaning of a statute is doubtful. Realty Bond & Share Co., v. Englar, 143 So. 152. In such cases the courts often look into prior and contemporary acts, the reason inducing the act, the mischiefs intended to remedy, the extraneous circumstances and the purpose intended to be accomplished. Bingham v. Sumner, 116 So. 270.

We gather from the wording and adoption of subsection (6) that the legislature intended to preclude a person from receiving any additional compensation for duties performed in any other capacity or position where the legislature had specifically spelled out the salary of such person either in a line item appropriation or in a particular statute.

A regular state employee does not fill a position the salary of which has been specifically fixed or limited by law. Accordingly, we do not believe that the legislature intended subsection (6) to be applicable to such state employees; although the provisions of §282.051(3)(e), F. S., would be applicable so that such employee, with budget commission approval, could be appointed to serve as a member of the sanitarians' registration board under Ch. 491, F. S.

Nor do we believe that a person who had initially been a member of the sanitarians' registration board would be precluded from subsequently becoming a state employee and receiving compensation therefor. We reach this latter conclusion by reading §282.051, F. S., in context with other provisions of Ch. 282, F. S., and in *pari materia* with statutes relating to similar matters.

Section 282.021(14), F. S., defines salary as the "cash compensation for services rendered *for a specific period* of time," (Emphasis supplied.) Section 122.02(3), F. S., relating to salaries for the purposes of state and county retirement system defines such word to mean the "*fixed monthly* compensation paid officers and employees . . . under no circumstances shall salary include fees paid professional persons for a special or particular service," (Emphasis supplied.) The $10 is payable only when the board member is attending official board meetings. While the rules of the sanitarians' registration board provide for at least two meetings per year, the maximum number is not fixed and would seem to vary depending upon circumstances.

Further, we are advised by the office of the comptroller that members of the sanitarians' registration board are not considered members of state and county retirement system, no deductions being made from their $10 per day therefor, nor is any withholding tax deducted from the said $10 per day. Accordingly, we do not believe that the $10 per day compensation for services rendered was intended by the legislature to be considered as salary as the word is commonly understood within the contemplation of §282.051, F. S.; nor do we believe that the phrase "nor in excess of amount so fixed or limited by law" set forth in subsection (6), was intended to limit a state employee serving as a member of the sanitarians' registration board to the $10 per day for meetings attended as his total compensation, in effect, waiving his compensation as a state employee. No literal interpretation shall be given a statute which would lead to an unreasonable or ridiculous conclusion or purpose not designed by the legislature. State v. Sullivan, 95 Fla. 191, 116 So. 255.

In view of the foregoing, we are of the opinion that regular state employees, except those employees who may be compensated by express legislative appropriation, who are otherwise qualified by the education and experience to be appointed to serve on the sanitarians' registration board would not be precluded by §282.051(6), F. S., from serving on said board and receiving, whenever attending official board meetings, $10 per day in addition to their regular salary as state employees subject to budget commission approval in accordance with §282.051(3)(e), F. S.

AS TO QUESTION 2:

Section 491.03(2), F. S., provides that "the state health officer *shall* be an ex officio member of the board" (Emphasis supplied.) The salary of the state health officer is fixed and limited by item 581(a) of the general appropriations act (65-135). Consequently, a person filling this position would not normally be entitled to receive compensation from more than one appropriation nor in excess of the amount so fixed, "unless specifically authorized by law."

As indicated above, the state health officer is required pursuant to a legislative directive to be a member of the sanitarians' registration board. Consequently, we must construe §491.03(2), F. S., as constituting an authorization by law within the contemplation of subsection (6) so as to render the said limitations in said subsection inapplicable to the state health officer.

Any other conclusion would seem to render the phrase "unless authorized by law" meaningless. In adopting this phrase, the legislature did so with the full knowledge of the existing statutes intending such statutes to have some useful or meaningful purpose.

Accordingly, we are of the opinion that the provisions of §282.051(6), F. S., and in particular the phrase "unless authorized by law" would not preclude the state health officer from serving as a member of the sanitarians' registration board. In addition, said section constitutes a legislative recognition of a certain exception to the provisions of this section.

Your questions are both answered in the negative.

065-85—August 6, 1965

REGULATION OF PROFESSIONS AND VOCATIONS

INTERPRETATION OF CH. 477, F. S.— LIMITATION OF PRACTICE OF MANICURISTS AND PEDICURISTS

To: Murray H. Dubbin, Dade County Representative, Miami

QUESTION:

What extent is a person authorized to practice as a manicurist or pedicurist under the provisions of Ch. 477, F. S.?

Chapter 477, F. S., provides for the regulation of the practice of cosmetology, manicuring and pedicuring in this state. Section 477.03(1), F. S., sets forth certain activities which constitute the practice of cosmetology as follows:

> (1) Any one or any combination of the following practices, *when not done for the treatment of disease or physical or mental ailments* and when done for payment either directly or indirectly or without payment for the public generally, constitutes the teaching and practice of cosmetology:
>
> * * * * *
>
> (f) Manicuring, or the cutting, polishing, tinting, coloring, cleansing, or manicuring the *nails* of any person, and massaging.
>
> (g) Pedicuring, or the shaping, polishing, tinting, coloring, cleansing, or pedicuring the *nails*, of the feet of any person, and massaging, or beautifying the feet of any person. (Emphasis supplied.)

Accordingly, it is clear from the foregoing that the activities of a manicurist or pedicurist are limited to the nails of the hands and feet and only to the extent that such activity involves cutting, polishing, tinting, coloring, cleansing or massaging, when not done for the treatment of disease or physical or mental ailments.

In your letter you raise some question concerning the extent to which a manicurist or pedicurist can "treat" the hands or feet. You refer to §477.08(1)(c), F. S., which relates to the courses taught at schools of cosmetology as follows:

> 477.08 *Schools of cosmetology; requisites; courses taught; enrollment of students.*—
>
> * * * * *
>
> (c) Manicuring or the cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person and massaging, cleaning, *treating*, or beautifying the hands or feet of any person. (Emphasis supplied.)

It is apparent that paragraph (c) refers only to the nature of the courses that are required to be taught at schools of cosmetology. In no manner could it be concluded that the legislature intended to permit manicurists to "treat" the hands or feet of any person except to the extent as mentioned in §477.03(1)(f), F. S., *supra*. Moreover, the provisions of subsection (1) specifically declare that the practice of manicuring or pedicuring does not include the treatment of disease or physical or mental ailments. Any other conclusion would seem to be contrary to the legislative intent expressed in Ch. 477, F. S., as well as in other related statutes.

The language used in a statute should be construed as an entirety and with reference to the purpose of the law as shown by all enactments on the subject; and the meaning of the words is ascertained by the connection in which they are used, and the evident intent disclosed by all the provisions on the same subject. (Peninsular Industrial Ins. Co. v. State, 55 So. 398, 61 Fla. 376.)

The term "treatment" is discussed in 70 C.J.S., Physicians and Surgeons, at p. 817, as follows:

> . . . In common parlance, and often in the law, 'treatment' is a broad term covering all the steps taken to effect a cure of an injury or disease. The word includes examination and diagnosis as well as application of remedies; it includes not merely the actual operation in a surgical case or the giving of a prescription in a nonsurgical case, but also the preliminary examination, including sometimes an exploratory examination. . . (Emphasis supplied.)

Accordingly, to construe the word "treat" in light of the above as authorizing a manicurist or pedicurist to treat injuries or diseases would result in an irrational construction not within the contemplation of the legislature. Moreover, such a construction would appear to also conflict with the provisions of §458.13(1), F. S., defining the practice of medicine and §461.01, F. S., defining the practice of chiropody. The treatment of any human disease or injury and, in particular, the treatment of ailments of the human foot or leg as defined in the foregoing sections by an unlicensed person constitutes a felony under §458.15, F. S., and a misdemeanor under §461.12, F. S.

In summary, it is my opinion that the extent to which a manicurist or pedicurist can "treat" the hands or feet of any person is as defined in §477.03(1)(f), (g), F. S., insofar as such practice relates to the cutting, polishing, tinting, coloring and cleansing of the nails, and when not done for the treatment of disease or physical or mental ailments. Any treatment other than in accordance with the foregoing would violate the provisions of Ch. 477, F. S., and would further appear to constitute either the practice of medicine or the practice of chiropody within the provisions of §458.13 and §461.12, F. S.

Your question is answered accordingly.

065-86—August 6, 1965

PROBATE

ESTATES OF DECEDENTS—FILING OF CAVEAT—FEES BY STATE AGENCIES

To: Theron A. Yawn, Jr., President, Florida County Judges Association, Starke

QUESTIONS:

1. Does the term "file" as used in §732.29(1), F. S., infer a duty upon the county judge to docket such caveats or is it sufficient if the judge simply receives them and places them in a file?

2. Should state agencies filing caveats under §732.29, F. S., be charged a fee for the services of the county judge's office?

3. If question 2 is answered in the affirmative, what charges should be made?

Section 732.29(1), F. S., provides as follows:

> If any state agency which is a creditor of the estate of a decedent is apprehensive that an estate, either testate or intestate, will be administered without its knowledge, or if any heir or distributee of the estate of a decedent is apprehensive that a will may be admitted to probate without his knowledge, such agency or person may file a caveat in the office of the county judge.

Black's law dictionary, 4th Ed., defines "Caveat" as an intimation to a judge or officer notifying him to suspend a proceeding until the merits of the caveat are determined.

It has been said that a caveat is a formal notice or a warning given by a party interested to a court, judge, or ministerial officer against the performance of certain acts within his power and jurisdiction. *In re* Phillips' Estate, 143A. 9.

In most jurisdictions the statutes which prescribe the proceedings before the probate and contest of wills permit a person in interest to file a caveat, petition for contest, or statement of objection to a will which has been offered for probate so as to permit him to wage a contest before the will has been probated. If a caveat is entered before probate of a will, the cause is transferred to the trial docket and all further proceedings in relation to the estate except the preservation of property and collection of debts are suspended pending the determination of the issues raised. (57 Am. Jur., Wills, §762, p. 520.)

In Street v. Crosthwait, 186 So. 516 at p. 517, the court stated that:

> . . . It is error to admit a will to probate until the required notice is given if the Caveat is *duly filed*. . . . (Emphasis supplied.)

The term "duly filed" means more than the mere act of filing but means reasonably, regularly and properly filed in compliance with the requirement of law. Watenpaugh v. State Teachers Retirement System, Cal. App., 328 P. 2d 203 at p. 208. (See also People v. Town Clerk of Bainbridge, 56 N.Y.S. 64 at p. 66.)

As a consequence of the above therefore, it appears that the term "file" as used in §732.29(1), F. S., means something more than the mere receiving of the caveat and placing it in a file. Furthermore, as a caveat is a formal document which gives notice, it should be entered in the progress docket of the proceedings in connection with the estate in which the caveat has reference.

Question 1 is answered accordingly.

The general rule with respect to question 2 is well answered by §44.05(2), F. S., the pertinent parts of which are as follows:

> . . . services may be performed for any governmental agency or unit without advance payment and the officer shall bill and collect the fees from such agency after the service is performed or when the amount due is determined.

Question 2 is answered accordingly.

With respect to question 3, §36.17(1), F. S., states that:

> The fees to be charged by the county judges of the various counties for the following services, except where otherwise provided, shall be:
>
> For filing and docketing of each paper not required to be recorded . . . 25¢

However, a county judge whose county falls within the population brackets (112,000-170,000) set out in Ch. 65-917, is allowed to charge a fee of $1.50.

Question 3 is answered accordingly.

065-87—August 6, 1965

CRIMINAL LAW

WORTHLESS CHECK CASES—PREPAYMENT OF COSTS

To: Ernest Ellison, State Auditor, Tallahassee

QUESTION:

In worthless check cases involving amounts less than $50.00, should the committing magistrate require the party applying for the warrant to deposit in advance the costs pursuant to §939.16, F. S.?

Section 939.16, F. S., provides as follows:

> In all cases justices of the peace and county judges in this state shall require payment in advance or security for costs of process, service of the same, and of examination, unless the party applying for a warrant shall make an affidavit of insolvency and of substantial injury to person or property by him suffered, in which case process shall issue without payment of costs.

The Florida Sup. Ct., in interpreting the provisions of the above statute, held in the case of Simmons v. State, 71 So. 278, that the provisions requiring a deposit of costs has no applicability to crimes of a public nature. This principle of law was reiterated in the case of Osceola County v. State, 155 So. 119 wherein the court held that a felony must be considered to be a crime of a public nature and therefore the provisions of the statute requiring payment in advance are inapplicable. The court has in effect said that crimes of a public nature are those criminal acts that tend to disturb the wanted financial, religious and moral calm of the whole community as opposed to some private injury to person or property.

The Florida legislature in the enactment of §832.05, F. S., clearly stated that it was for the purpose of remedying the giving, passing and circulation of worthless checks, drafts, bills of exchange and other orders on banks which tended to create mischief to trade and commerce. Worthless checks, regardless of the amount, tend to affect the general public in that when they are put into circulation, they disrupt not only the financial but the moral climate of the general public.

In AGO 058-300, biennial report, p. 859, it was said:

> It appears that the legislature has definitely brought the crime of worthless check passing into the field of crimes of a public nature and it is now the opinion of this office that the crime of worthless check passing should therefore be lifted from the requirements of §939.16, F. S.

The Florida legislature in 1961 amended §832.05, F. S., and added subsection (7), which reads as follows:

> COSTS.—Where prosecutions are initiated under §832.05 before any committing magistrate, the party applying for the warrant shall be held liable for costs accruing in the event the case is dismissed for want of prosecution. No costs shall be charged to the county in such dismissed cases.

This new subsection (7), specifically provides that in all cases that are dismissed for want of prosecution, the party applying for the warrant shall be held liable for the costs. Therefore, in those cases in which the committing magistrate has not required a deposit for costs and the case is subsequently dismissed for want of prosecution, the county is relieved from the payment of any costs.

It would, therefore, appear that all worthless checks, regardless of the amount, should be considered as crimes of a public nature and the provisions of §939.16, F. S., are inapplicable. However, no costs shall be charged to the county in those cases dismissed for want of prosecution.

Your question is answered in the negative.

065-89—August 6, 1965
See 1965 Amendments to §13, Art. IX, State Const., and §320.081, F. S.

TAXATION

STATUS OF HOUSE TRAILERS, ETC.—SUBJECT TO AD VALOREM TAXES WHEN MOVED OVER HIGHWAYS AND ROADS

To: J. C. Knott, Attorney, Department of Motor Vehicles, Tallahassee

QUESTION:

Are house and other trailers subject to ad valorem taxation under Palethorpe v. Thomson, Fla., 171 So.2d 526, drawn over the highways, roads and streets of this state, being towed by a motor vehicle from one location to another for other than general transportation purposes, subject to registration as a motor vehicle?

These house and other trailers, not being used for general transportation purposes, as were those involved in Wood v. Club Transportation Services, Inc., 143 Fla. 449, 196 So. 843, are not motor vehicles within the purview of §13, Art. IX, State Const. (Wood v. Club Transportation Services, Inc., *supra;* Palethorpe v. Thomson, *supra*). This is true although there is hauled in such trailers the furnishings and equipment necessary for using the said trailers as residences and for residential and housing purposes. Where such a trailer is being moved from one location to another, and is not being used for general hauling and transportation purposes, it would not be a motor vehicle within the meaning and purview of said §13, Art. IX, State Const., and, therefore, not a motor vehicle within the meaning and purview of said section of the constitution. To be entitled to exemption as a motor vehicle, or a part thereof, such a trailer must be used for general transportation purposes and not be in the process of merely moving from one location to another within the state for the mere purpose of changing its location as well as the personal property moved therein. To be a motor vehicle such a trailer, and the motor vehicle pulling it, must be used primarily for the transportation of persons or property as a business.

Under the opinions in Wood v. Club Transportation Service, Inc., and in Palethorpe v. Thomson, *supra*, the determining factor of whether or not the combination of a trailer and a motor vehicle becomes itself a motor vehicle within the purview of Wood v. Club Transportation Service, Inc., *supra*, is the primary use of the combination for transportation purposes and for no other purposes. From the opinions in these two cases, as well as the applicable constitutional and statutory provisions, it appears that for such a combination itself to be deemed a motor vehicle such combination must be used primarily for the transportation of persons or property, or both, over the highways, streets and roads of the state; a secondary use for such purposes is not sufficient for a classification of such a combination as a motor vehicle under §13, Art. IX, State Const., and to permit tax exemption for such combination. The primary use of such a combination is the determining factor as to whether the combination is to be deemed a motor vehicle

within the purview of §13, Art. IX, State Const. The fact that a house or other trailer might be used as a means of transportation is not sufficient. To be classified as a motor vehicle the use of the combination must be primarily for transportation use and for no other use.

There would be little, if any, distinction between a trailer, not suitable for transportation purposes, and a hay bailer, a threshing machine, a potato digger, and similar equipment pulled over a highway by a motor vehicle merely and only for the purpose of moving the same from one location to another, or even a house being moved over a highway. In neither case is there a combination of vehicles being used primarily for transportation purposes.

A house or other trailer designed to be used for housing or other nontransportation purposes, not being used primarily for transportation purposes over the highways, roads and streets of the state, when attached to a motor vehicle, or other moving force, for the purpose of being moved over the highways, roads and streets of the state from one location to another, may not be deemed a motor vehicle for the purposes of Ch. 320, F. S., and is not subject to the license taxes provided for in §320.08, F. S., unless its primary use becomes one of the transportation of persons and property over the highways, roads and streets of the state. Such trailers are not motor vehicles within the purview of §13, Art. IX, State Const., and are not subject to the license taxes provided for in §320.08, F. S. They are tangible personal property subject to ad valorem taxation unless they are used in such a manner as to make them part and parcel of the real estate on which located. They differ little, if any, from well drilling equipment mounted on separate vehicles, hay bailing equipment, and other farming equipment not designed for use on the highways, roads and streets, but which may on occasion be moved over the highways, roads or streets, or the moving of houses and other buildings over the highways for short distances, or the moving of oversized vehicles and loads over the highways, roads and streets. Doubtless the state road department has rules and regulations applicable to the moving of such vehicles and equipment over the highways, roads and streets of the state.

Your question is answered in the negative, subject to the above observations.

065-90—August 6, 1965

TAXATION

METHOD OF FIXING MILLAGE IN YEAR OF REVALUATION—CONSTRUCTION OF §193.03, F. S., AS AMENDED

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. In arriving at a ratio figure as provided for in §193.03 (1) and (6), F. S., i.e., ". . . the ratio of the total of assessed valuation in the current year to the total of assessed valuation in the preceding year . . . ," is the new property and previously nontaxed property included in "the total of assessed valuation for the current year?"

2. Section 193.03 (1) and (6), F. S., indicates that the 10% millage increase is an increase of the previous millage as proportionately reduced, whereas subsection (1)(a) indicates that the 10% increase is an increase of 10% of the previous budget as compared to the total budget. Which section controls?

3. What effect, if any, will the millage limitation have on income for the payment of outstanding bond issues and new bond issues (certificates of indebtedness)?

4. Assuming a possible delay in the preparation of the assessment roll due to reassessment and delays in review and meetings of the board of equalization, what effect will these delays have on the discount provisions as set forth in §193.41, F. S.?

5. Will a delay in adopting a fixed budget for 1965-66 affect the matching fund program from either state or federal sources?

Section 193.03, F. S., was amended by both Chs. 63-250 and 65-258; Section 193.41, F. S., does not appear to have been amended in the 1963 or 1965 sessions of the Florida legislature. Chapter 65-258, as is provided by §4 thereof, is not effective until Jan. 1, 1966, and is, therefore, inapplicable to the tax year of 1965 with which we are here concerned, but will be applicable to the tax year of 1966. Said §193.03(1), F. S., as amended by Ch. 63-250, thereof, requires that: "After the assessment rolls have been prepared on the basis required by law (see Schuler v. Walter, decided by the Supreme Court of Florida but not yet reported in the Southern Reporter), the Board of County Commissioners and the Board of Public Instruction and all other governing boards and governing authorities of all other taxing districts, within the counties, including municipalities, whose taxes are assessed on the tax roll prepared by the county assessor, shall . . . reduce the millage to be levied by each such governing authority from what it was in the preceding year in proportion to the increase of the general level of the assessed value over the preceding year . . ." The reference to the general level of the assessed value over the preceding year seems to refer to the ratio of the assessed value of taxable properties to their just or market value.

Under the opinions of the Sup. Ct. of Fla., in Schuler v. Walter, *supra;* McNayr v. State, Fla., 166 So.2d 142; Green v. Walter, Fla., 161 So.2d 830, and authorities therein cited, the required level of assessed value of property to just or market value is 100%; in other words, the assessed value is required to be the same as the just or market value. Said §193.03, F. S., as amended in 1963, and 1965, contemplates that the assessed valuation of the properties taxed after its effective date, will be assessed on the basis of their just or market value as defined in Schuler v. Walter, *supra*, and not on some other level of assessed value to true or market value. Section 193.03(6), F. S., as amended, both in 1963, and 1965, in connection with the comparison of the value of taxable properties in the current tax year and in the previous tax year as required by said section, provides that "such totals of assessed valuation shall *exclude* the value of all property and improvements not assessed in both years. The assessor shall maintain a separate list of all properties and improvements which were added to the tax rolls each year and a separate list of properties and improvements which are withdrawn from the rolls." (Emphasis supplied.) In other words, when the tax assessor makes his calculation of the total valuation of the taxable properties on the tax roll for a current year and a previous year he will include in his calculation only those properties assessed on the tax rolls for both such years.

From the above and foregoing it is determined that question 1 is answered in the negative. The new property and previously nontaxed properties are not included "in the total of assessed valuation for the current year," or the previous year, when not assessed for both said

years, in calculating the basic millage pursuant to §193.03, F. S., as amended, but would be included for the purpose of assessing the current year's tax levies.

Section 193.03, F. S., as amended in 1963, was construed by this office in AGO 065-35, of March 30, 1965, insofar as it related to the increase of the basic millages as provided in and by said section, to which reference is hereby made, for the fiscal year 1965-66. However, question 2, becomes material for the 1966-67 fiscal year and subsequent fiscal years, and at least intimates conflicting provisions within said §193.03 as amended. The general rule is that "the different parts of a statute reflect light upon each other, and statutory provisions are in *pari materia* where they are parts of the same act. Hence a statute should be construed in its entirety, and as a whole. The general intention is the key to the whole act, and the intention of the whole controls the interpretation of its parts." (50 Am. Jur. 350-354, §352; see also 30 Fla. Jur. 214 and 215, §110). The language in said §193.03(1)(a), F. S., requires that the budget making authority give notice of "the fact that the *said* increase of not exceeding ten per cent is being proposed," (Emphasis supplied.) which reference is clearly to the "increase of no more than ten per cent" mentioned in the introductory portion of said §193.03(1), F. S. Under these rules of construction we feel that the legislature intended a millage increase which in turn would increase the funds going into the budget. If we reconcile the apparent conflicts mentioned by holding that the reference in the first case is to the adjusted millage and, in the second case, is to the proceeds to be obtained from the millage mentioned, then each is given a field of operation. This seems to answer question 2.

Bond contracts relative to taxation to raise funds for the bonds issued are intended as a means of raising funds for the payment of the bonds. These contracts are usually within the purview of the contract clause of the federal constitution, and merely contemplate the raising of funds sufficient for the payment of the bonds and the interest thereon and nothing more. In most such cases the requirements of the bond contract, and not the statutes, such as §193.03, F. S., control, where the application of such a statute would be violative of the contract clause of the federal constitution. This seems to be violative of the contract clause of the federal constitution. This seems to answer question 3.

Although §§193.41, 199.16 and 200.26, F. S., provide for discounts for taxes paid in Nov., Dec., Jan., and Feb., no statute or constitutional provision makes specific provision for discounts where the tax rolls are not open for payment on Nov. 1, of the tax year and the right to make payment is delayed without the fault of the taxpayers. In most instances where, by reason of litigation or otherwise, there is a material delay in the opening of the tax roll for the payment of taxes there has been granted the right to have the discount notwithstanding the delay, so long as the books will be open for payment within a reasonable time. In Green v. Walter, Fla., 161 So.2d 830, because of litigation the intangible tax roll was not delivered to the tax assessor until around the first of March; the Sup. Ct. permitted a 4% discount if paid within the first 30 days after the tax roll came into the hands of the tax collector, but no discount after the said 30 days. In other cases the comptroller has authorized discounts of 4% for the first 30 days after the tax roll was open for payment, with the normal discount for the period following said 30 days, that is, as specified in said §§193.41, 199.16 and 200.26, F. S. Under this practice a tax roll opened for collection on Jan. 1, would be subject to a 4% discount during January but only 1% discount in February. This seems to answer question 4.

Any delay in the adoption of a budget, by reason of revaluation, where the agency for which the budget was adopted was not chargeable with the delay, would not appear to affect the state matching fund program; however, the effect of such a delay on federal matching funds is a federal question that should be ascertained from the applicable federal agency. This seems to answer question 5 as well as it may now be answered.

The 5 above-stated questions are answered as follows:

1. The ratio figure provided in §193.03(1) and (6), F. S., 1963, by which all millages assessed in the preceding year (for example, 1964) must be divided to determine the basic millages for the current year (for example, 1965), is to be determined by taking the total assessed valuation in preceding year (for example, 1964), as well as in the current year (for example, 1965), and deducting therefrom the values of all properties and improvements not assessed in both said years. For example, should the total valuation for the current year be $200,000,000, and for the previous year be $100,000,000, with certain properties being omitted from each tax roll for each of such years, having a valuation in the current year of $20,000,000 and in the previous year of $10,000,000, then our formula becomes the ratio of $180,000,000 to $90,000,000, or 2 to 1. Suppose the millage for one of the purposes was 10 mills in the previous year then the basic millage for the current year would be 5 mills, subject to such increases as the statutes and laws may provide for and the procedures provided therein.

2. The apparent conflicts between §193.03(1) and (6), F. S., as amended by Ch. 65-258, may be reconciled when it is realized that the reference in subsection (1) thereof relates to the adjusted millage. Subsection (6) of said section has reference to the proceeds to be derived from the millage mentioned therein. Thus, each limitation has a separate and independent field of operation.

3. Contract clause of the federal constitution operates to preserve the provisions of the bond contract document from the application of the provisions of §193.03, F. S., as amended, where the application of that section would in any way alter the express bond document provisions so as to lessen the security or operate to the detriment of the bondholders.

4. In Green v. Walter, Fla., 161 So.2d 830, because of litigation the intangible tax roll was not delivered to the tax assessor until around the first of March; the Sup. Ct. permitted a 4% discount if paid within the first 30 days after the tax roll came into the hands of the tax collector, but no discount after the said 30 days. In other cases the comptroller has authorized discounts of 4% for the first 30 days after the tax roll was open for payment, with the normal discount for the period following said 30 days, that is, as specified in said §§193.41, 199.16 and 200.26, F. S. Under this practice a tax roll opened for collection on Jan. 1, would be subject to a 4% discount during January but only 1% discount in February.

5. Where the agency for which the budget was adopted was not chargeable with the delay, for example, because of litigation, etc., such delays would not seem to affect state matching fund programs.

065-91—August 16, 1965

REGULATION OF TRADE, COMMERCE, ETC.

YACHT AND SHIP BROKERS ACT—DEFINITION OF BROKER

To: Randolph Hodges, Director, Board of Conservation, Tallahassee

QUESTIONS:

1. Who is covered by the definition of "broker" as used in Ch. 65-562 (Ch. 537, F. S.) entitled the yacht & ship brokers act?

2. When does the initial licensing year begin under Ch. 65-562 (Ch. 537, F. S.)?

AS TO QUESTION 1:

The word "broker" is defined in §537.02(1)(a), F. S., as follows:

> 'Broker' means a person who, as a whole or partial vocation, *for others*, sells or offers for sale, buys or offers to buy, lists, solicits prospective purchasers of, negotiates the purchase of, sale or exchange of, charters, offers to charter, negotiates the charter of, leases, rents, places for lease or rent, or negotiates loans on yachts or ships. A person shall be deemed to be a broker within the meaning of the law if, *for another*, he does any of the acts or participates in any of the transactions herein defined, even though at some subsequent time he may obtain title to, or procure in his own name the certification or registration of the yacht or ship in question. (Emphasis supplied.)

In order to constitute a broker within the above definition, one must deal for others in yachts or ships. The generally accepted definition of broker is one who acts as an agent, middleman or negotiator between other persons; i.e., one who acts as an intermediary to bring about bargains and contracts between others in matters of trade. "Broker" is defined in Black's law dictionary (4th Ed. 1951) as follows:

> An agent employed to make bargains and contracts for a compensation. Story, Ag. §28; Payne v. Ponder, 139 Ga. 283, 77 S.E. 32, 34. . . . A middleman or negotiator between parties. San Jacinto Life Ins. Co. v. Brooks, Tex. Civ. App., 274 S.W. 648, 650; Messick v. Johnson, 155 Okl. 139, 8 P. 2d 28, 30; Gile v. Tsutakawa, 109 Wash. 366, 187 P. 323, 326; Civil Code La. art. 3016. A person dealing with another for sale of property. Davis v. Chipman, 210 Cal. 609, 293 P. 40, 44. A person whose business it is to bring buyer and seller together. Keys v. Johnson, 68 Pa. 42. . . .

In considering the act as a whole, it appears that the legislature intended to regulate transactions entered into by brokers and charterers and not bona fide owners of yachts and ships. This is true because of the name of the act, and the definition of a broker as one for others. I refer you to §537.04(4)(a), F. S., of Ch. 65-562, which provides that the act shall not apply "to a transaction involving the sale by an individual or corporation of his or its own yacht or ship."

It does not appear that the legislature intended to include travel agents, hotel and motel operators arranging special cruises or fishing trips for clients or guests, or operators of charter fishing boats within the above definition unless they are persons dealing for others in yachts or ships. This appears to answer question 1.

AS TO QUESTION 2:

Section 15 of Ch. 65-562, provides that, "This act shall take effect immediately upon becoming a law." The act became a law without the governor's approval and was filed in the office of the secretary of state on June 25, 1965.

Section 7 of Ch. 65-562 (§537.07, F. S.) provides in part as follows:

> (1) In the month of December each year, every person licensed under this act shall file with the board an application for renewal fee required by this act, whereupon the board shall renew his license. Every license not renewed in accordance with this section shall expire on January 1 of the year following the year for which it was issued or renewed and shall forthwith be returned to the board . . .

Although the law is presently in effect, it is reasonable to assume that the legislature did not intend that licensing take place immediately under the act, since time is needed to establish and set up the procedures and machinery for its administration. Rather, it appears from §7(1), above that the initial licensing year would begin on Jan. 1, 1966, with license applications being made in the month of Dec., 1965.

Section 11 of said Ch. 65-562 (§537.11, F. S.) states that the provisions of §4(6), pertaining to applications; §4(7)(a), relating to written examinations; §4(7)(b), concerning the certification of honesty, truthfulness, etc.; and §4(7)(c), concerning the certification that one has never been convicted of a felony, do not apply to persons who were licensed and approved as of April 1, 1965, by the state, county or municipality to act as a broker of yachts or ships. This does not mean that these persons are exempt from acquiring a license under this act; more properly that they shall have a license beginning with the initial licensing year which begins on Jan. 1, 1966, with the exceptions noted in §4 above.

In conclusion it appears that the initial licensing year under Ch. 65-562 (Ch. 537, F. S.), begins on Jan. 1, 1966, with license applications being made in the month of Dec., 1965.

065-92—August 17, 1965

LABOR

PREVAILING WAGE LAW

To: Patrick H. Mears, General Counsel, State Industrial Commission, Tallahassee

QUESTIONS:

> 1. Where electric lighting is being installed to illuminate a public road or highway and the work of installing the electric cables, light posts, and other materials necessary for the electric lighting system is being done simultaneously with the construction of the road or highway under the same general contractor, are the laborers, mechanics, and apprentices employed solely in connection with the electric lighting system exempt from §215.19, F. S., by reason of §215.19(4)?
>
> 2. Where electric lighting is being installed to illuminate a public road or highway and the work of installing the electric cables, light posts, and other materials necessary for the electric lighting system is being done simultaneously with the construction of the road or highway but under a different general contractor, are the laborers, mechanics, and apprentices employed solely in connection with the electric lighting system exempt from §215.19, F. S., by reason of §215.19(4)?

3. Where electric lighting is being installed to illuminate an existing public road or highway and the work of installing the electric cables, light posts, and other materials necessary for the electric lighting system is being done at a time when no construction, repair or maintenance is under way or under contract with respect to the actual road or highway itself, are laborers, mechanics, and apprentices employed on such electrical work exempt from §215.19, F. S., by reason of §215.19(4)?

4. Does the term "public road," as used in §215.19(4), F. S.), include a city street built and maintained by a municipality, which is not part of the State or County highway system?

It is first necessary to recite the pertinent provisions of the above section of law. Section 215.19(4), F. S., provides in part the following:

> (4) Nothing in this section shall apply to contracts for the construction, repair or maintenance of public roads or highways, except that all its provisions shall apply to contracts for the construction of bridges on public roads and highways, where the contract price for such construction shall exceed fifty thousand dollars or such bridge shall be located in a large metropolitan area; provided however, that the provisions of this section shall not be applicable to any construction or contracts for public works with respect to which prevailing wage rates are required to be established pursuant to federal authority.

In order to answer these questions, it is necessary to determine what is a public road or highway within the meaning of the statute and other applicable law. A public road or highway has been defined by case law as follows:

> 'Public road' and 'highway' generally mean the same thing and though definitions are not uniform, running through them is general idea of current way of public passage. Davenport v. Cash, 74 So.2d 470, 271 Ala. 380.

Again:

> There is no legal distinction between 'highway' and 'public highway,' but 'highway' is generic term for all kinds of public ways and phrase 'public highway' is a tautological expression, since all highways are necessarily public. Sexton v. State, 196 So. 746, 239 Ala. 662.

The term "road" is also defined in §334.03(13), F. S., as follows:

> (13) Road.—The term *road* shall be construed to include streets, *sidewalks*, alleys, highways, and other ways open to travel by the public, including the road bed, *right-of-way*, and all culverts, drains, sluices, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels and viaducts necessary for the maintenance of travel and all ferries used in connection therewith. (Emphasis supplied.)

You will note from the foregoing statutory definition of roads that rights-of-way and sidewalks are included as an integral part of the road. Accordingly, since the electric lighting would necessarily be installed on the right-of-way or sidewalks of a road or highway, it becomes a fixture by virtue of annexation and contemplated use. Therefore, it is a part of the road or highway and would be encompassed in the exception in the "construction, repair or maintenance of public roads or highways" and laborers, mechanics and apprentices employed solely in connection with the electric lighting system would be exempt from §215.19, F. S., from receiving prevailing wages by reason of subsection

(4) of said statute in the instances listed in your 3 questions. The exemption, of course, would not apply where federal funds are utilized in the construction, repair or maintenance of federal designated roads or highways. It would only apply to state, county, and city roads.

In view of the foregoing definitions concerning the term "public road," it is my opinion that a city street would also be considered a public road within the meaning of §215.19(4), F. S.

In passing, I must note that there would appear to be a very limited amount of personnel in the electrical trade who would actually be affected by this exemption. The majority of the electrical workers employed in the installation of street or highway lighting systems are usually employees of municipally owned light companies or public utilities, who usually are paid in excess of the minimum prevailing wage designation in any given location.

065-93—August 17, 1965

STATE BOARD OF EDUCATION

PAYMENT OF APPRAISED VALUE OF SCHOOL PROPERTY —BUS DRIVER'S SALARY

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May a county school board pay more than the appraised value of any property, including school buses as provided in §130-3.07 of state board of education regulations?

2. Where a county school board does pay more than the appraised value of any property, including school buses as provided in §130-3.07 of state board of education regulations, may each member of such board be personally liable for the amount paid therefor in excess of the appraised value?

3. Does a county school board have authority within the purview of the law to adopt a salary schedule for bus drivers considerably in excess of that recommended by a school transportation survey as provided in Ch. 65-424?

Section 130-3.07, state board of education regulations, prescribes certain "requirements" which "must be met in full" in the use of minimum foundation funds in the purchase of secondhand transportation equipment. Among these requirements are:

(1) Certification by the county board as to an 'emergency' or 'some good and specific reason' why such a purchase would be 'in the best interest of the county schools.'

(2) Appraisal of the 'proposal for the sale of used transportation equipment' by 'three reputable, experienced automobile dealers, mechanics or salesmen,' one to be designated by the seller, one by the county board, and the third to be selected by the two so designated.

There is nothing in this section requiring the county board to accept the appraisal of such a three-man team. Indeed, §130-3.07(3), specifically provides: "The county board shall reserve the right to reject any and all proposals." However, it seems clear that the intent of this regulation is that such equipment shall be purchased only on the basis of such an appraisal and for a price not to exceed the amount thereof. The

provision as to rejection of proposals is not to be interpreted as authority to purchase without an appraisal or for a price higher than the rejected appraisal. If an appraisal is rejected, a new one must be obtained in the manner prescribed before a valid purchase could be made.

It should be noted that the procedure under §130-3.07 is to be followed only when "an emergency exists, or . . . for some good specified reason it is in the best interest of the county schools." Otherwise, the procedure must be as provided in §§130-3.04-130-3.06. Procedure for obtaining approval of a bid at a higher price than the lowest bid is specifically set forth in §130-3.05(3).

Section 237.23, F. S., provides in part as follows:

> (1) . . . any contract or attempted contract entered into by any school officer or subordinate school officer, not within the purview or in violation of the provisions of (Sections 237.01-237.24, Florida Statutes) shall be void and no such contract or attempted contract shall be enforceable in any court.
>
> (2) Each and every member of any county board voting to incur an indebtedness against the county or district school funds in excess of the expenditure allowed by law . . . and any chairman of a county board or the county superintendent who shall sign a warrant for payment of any such claim or bill of indebtedness against any of the said funds shall be personally liable for the amount. . . .

Question 1 is answered in the negative.

Question 2 is answered in the affirmative as to any member of the county board who voted to pay more than the appraised value of the property.

As to question 3, I have carefully examined the provisions of Ch. 65-424 to which you refer. It is my opinion that there must be substantial compliance with a schedule recommended by the school transportation survey. A county board could not adopt a salary schedule for bus drivers that would be detrimental to other phases of the overall educational program. However, I find nothing in the law that would prohibit the adoption of a salary schedule for bus drivers which, while not precisely the same as or lower than the survey recommendation figure, is not unreasonably in excess of the recommended amount.

Subject to the above-mentioned qualifications, question 3 is answered in the negative.

065-94—August 17, 1965

EDUCATION

VOCATIONAL-TECHNICAL CENTERS EARMARKED FUNDS—ESTABLISHMENT OF PRIORITIES

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May funds authorized in §1(2), of Ch. 65-323, (§282.013-(2), F. S.), properly be used for the following purposes:

a. To provide vocational-technical facilities at a comprehensive high school designated officially as an area vocational-technical center?

b. To provide vocational-technical facilities at a comprehensive community junior college designated as an area vocational-technical center, provided, that the vocational-technical programs to be housed are not financed by, nor a part of, the junior college minimum foundation program?

c. If the answer to either a. or b. is in the affirmative, may such funds be used to provide general purpose classrooms or spaces other than those specifically related to vocational or technical programs?

2. Under provisions of §1(4)(b), Ch. 65-323, (§282.013(4)-(b), F. S.), in the event the total amount of funds itemized in subsection (4)(a) is not available from the institutions of higher learning and junior college capital outlay and debt service trust fund, must the amount allocated to each individual junior college listed in subsection (1) be reduced proportionately or may the formula for reduction in such an event be applied only to the total of $37 million authorized for junior colleges?

3. Does the state board of education or the state board for vocational education have the authority to establish a priority in approving projects under this law according to numbers of students served, or other factors, or as among junior college vocational-technical facilities, comprehensive high school vocational facilities, and separate vocational centers?

Chapter 65-323, provides in §1 (§282.013(1)-(5), F. S.), authorization for the expenditure of appropriation and bond funds for capital outlay projects for several university, junior college and technical training center buildings. Section 1(1)(b) provides:

> Of the amounts of money appropriated in paragraph (a) of this subsection *not less than $8,000,000 shall be expended for vocational-technical facilities in the respective junior colleges.* (Emphasis supplied.)

Section 1(2) provides:

> *State board of education for providing capital outlay facilities and equipment for vocational and technical education in area vocational-technical centers, as designated by the state board of education.* Criteria for any area vocational-technical center to be established shall comply with criteria established by the state board for vocational education and the law; *provided, however, such criteria shall not require more than 150 full-time students, or the equivalent thereof, for the establishment of a new vocational-technical training center. It is the intent of the legislature that such centers, as herein defined, shall constitute a project as required by section 19, article XII of the constitution of the state of Florida. The amounts designated in this subsection shall be allocated to the boards of public instruction of the counties operating the area vocational-technical centers, not included as a part of the program of a junior college,* upon request of the board of public instruction of the county subject to the approval of such request by the state board of education and the budget commission, and *the comptroller shall disburse the approved amount to the county's school fund to be deposited to the credit of the vocational-technical center construction fund to be established by said county board.* (Emphasis supplied.)

Item	Amount
A. Area Vocational-Technical Centers (provided that not more than $500,000 in state funds shall be expended at any one center, *and provided further that at least one-half of any federal matching funds available for capital outlay shall be allocated during the biennium 1965-1967 to match funds provided in this item for area vocational-technical centers, not included as a part of the program of a junior college,* which federal matching funds shall be in addition to the state funds provided herein)	$8,000,000

(Emphasis supplied.)

Section 1(3) of the act provides similar authorization for the construction of the designated university buildings at the various state universities. Section 1(4)(a),(b), provides guidelines for the allocation of funds as all funds are realized, or in the event the funds available do not meet all authorized construction. In the latter event, the funds are to be allocated on a reduced basis proportionately so that the "total amounts allocated to projects set forth in subsections (1), (2) and (3) as restricted in subsection (4)(a) of this section shall be in the same ratio to total allocations as the ratio of the maximum amounts authorized to be allocated (as restricted by subsection (4)(a) is to the total of the maximum amounts authorized to be allocated as set forth in paragraph (a) of this subsection, except that allocations to the universities under the Board of Regents may be changed in an amount not to exceed five per cent (5%)."

Section 3 of the act amends §230.63(2), F. S., to read:

> (2) COUNTY BOARDS OF CONTIGUOUS COUNTIES MAY ESTABLISH OR ACQUIRE AREA VOCATIONAL-TECHNICAL CENTERS.—*The county boards of any two or more contiguous counties may, upon first obtaining the approval of the state board, enter into an agreement to organize, establish and operate, or acquire and operate, an area vocational-technical center under this section.* (Emphasis supplied.)

To my knowledge, there has been no judicial interpretation of this act.

Your attention is also directed to the provisions of Ch. 65-468, (§230.631, F. S.), which provides:

> Section 1. No area vocational school shall be established in the State of Florida without meeting the requirements of the state plan for vocational education adopted by the state board for vocational education and the criteria based on current requirements as established by the state board for vocational education and such additional criteria as may be prescribed by the state board for vocational education for area vocational facilities; provided, however, such criteria shall not require more than one hundred fifty (150) full-time students, or the equivalent thereof, for the establishment of a new vocational-technical training center.

In view of the above-cited statutory provisions, I believe your specific questions are best answered as follows:

Question 1a. It is my opinion that the legislature has created a third type of educational institution designated as area vocational training centers. Such centers are separate and distinct facilities and not a part of junior colleges or high schools. They are to be constructed

from the funds authorized in this act and operated by their own administrative personnel under the immediate policy direction of the local school board and county school superintendent and under the general supervision of the state superintendent of public instruction and the vocational education division of his office. It should be noted that the funds involved are for use in constructing and equipping the necessary buildings which must be used for the sole purpose of providing vocational-technical training centers. Operating costs of these facilities are not involved but must be derived from other authorized local and state funds.

In some instances, the county board and state board of education may find it advantageous to locate these centers on land already owned for school purposes which are partially occupied by buildings used for comprehensive high schools. I do not believe it was the legislative intent to preclude this type of economy and efficiency. However, as stated above, the vocational training centers authorized by Ch. 65-323, are to be separate facilities and not a part of a comprehensive high school. Subject to the above observations, your question is answered in the negative.

As to question 1b. Your attention is directed to the language of §1(2), Ch. 65-323, which provides in part:

> The amounts designated in this subsection shall be *allocated to the boards of public instruction of the counties operating the area vocational-technical centers, not included as a part of the program of a junior college . . .* (Emphasis supplied.)

In view of the above, your question is answered in the negative.

As to question 1c, since the 2 preceding questions are answered in the negative, no answer is required.

As to question 2, §1(4)(b), of the act provides:

> In the event the funds which become available pursuant to section 19, article XII of the constitution of the state of Florida, are less than the maximum amounts authorized in paragraph (a) of this subsection, *the allocation of funds shall be reduced proportionately so that the total amounts allocated to projects set forth in subsections (1), (2) and (3) (as restricted in subsection (4a) of this section shall be in the same ratio to total allocations as the ratio of the maximum amounts authorized to be allocated (as restricted by subsection 4a) is to the total of the maximum amounts authorized to be allocated as set forth in paragraph* (a) *of this subsection, except that allocations to the institutions under the board of regents may be changed in an amount not to exceed five per cent (5%).* (Emphasis supplied.)

It is my opinion that in view of this provision, the total amount authorized for junior colleges must be reduced proportionately and the amount allocated to each separate project included would also be reduced and released on a pro rata basis.

I believe question 3 is partially answered by question 2 above. All of the projects contemplated, whether university buildings, junior colleges or vocational training centers, must be finally approved by the state board of education and state budget commission before bonds can be issued for their construction and the funds released. It is my opinion that the state board of education can and should establish priorities within each of the three separate categories of institutions contemplated, based on practical considerations such as the time required for planning and construction. The board, however, does not have authority to estab-

lish priorities on the overall amount authorized and available if such priorities might result in diverting authorized funds which are available from one category of institution to another. In other words, priorities could not be established which would give either universities, junior colleges or technical training centers as contemplated in the act an advantage or cause one category of institution to benefit at the expense of another.

It should be noted that the act in §1(2) quoted above specifically states that in establishing criteria for vocational training centers "such criteria shall not require more than 150 full-time students or the equivalent thereof for the establishment of a new vocational training center."

Question 3 is answered accordingly.

065-95—August 17, 1965

CIVIL ACTIONS

CLERK'S FEE IN GARNISHMENT PROCEEDING

To: Curtis R. Barnes, Clerk, Circuit Court, Brevard County, Titusville

QUESTION:

What is the fee of the clerk of the circuit court for deposits made pursuant to §77.28, F. S.?

It is recognized that funds paid into the registry of the court without the court's sanction are subject to withdrawal by a depositor and do not become funds in *custodia legis*. Phipps v. Watson, 108 Fla. 547, 147 So. 324. We believe that funds paid into the court pursuant to statutory direction, i.e., §77.28, F. S., are in the custody of the court to the same degree as though deposited by express court order.

Hence, it is my opinion that the clerk of the circuit court is authorized a fee provided by §28.24, F. S., for the receiving and paying out of moneys in the registry of the court.

065-96—August 17, 1965

COURTS

JUDGE OF METROPOLITAN COURT OF DADE COUNTY—COMMITTING MAGISTRATE OF PERSONS CHARGED WITH VIOLATION OF STATE CRIMINAL LAW UNAUTHORIZED

To: Thomas C. Britton, County Attorney, Dade County, Miami

QUESTION:

Do judges of the Metropolitan Court of Dade county have the authority to act as committing magistrates in instances where persons are charged with violations of state criminal laws?

Section 11, Art. VIII, State Const., authorized the electors of Dade county to adopt a home rule charter and provided that ". . . such charter may create new courts and judges and clerks thereof *with jurisdiction to try all offenses against ordinances passed by the Board of County Commissioners of Dade County . . .*" (Emphasis supplied.) The Metro. Ct. was established by the home rule charter which was adopted by said electors and the judges thereof were appointed by the board of county commissioners pursuant to said charter. It is therefore apparent that said constitutional provision, and the home rule charter

adopted pursuant to its authorization, did not authorize the judges of the Metro. Ct. to deal in any way with offenses against the criminal laws of the state, neither as committing magistrates nor otherwise.

Does any other constitutional or statutory provision confer upon Metro. Ct. judges the authority to act as committing magistrates with respect to offenses against state criminal laws? I think not.

Section 1, Art. V, State Const., reads as follows:

> *The judicial power of the State of Florida is vested in* a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish. (Emphasis supplied.)

This constitutional provision means that the judicial power of the state is vested only in the courts and commissions therein referred to, and none other. Said constitutional provision does not refer to the Metro. Ct. by name and said court does not come within the final words "and such other courts . . . as the legislature may from time to time ordain and establish;" the Metro. Ct. was ordained and established by the home rule charter adopted by the voters of Dade county under the authorization of §11, Art. VIII, State Const., and not by the legislature. In Hall v. Strickland, 170 So.2d 827, the Sup. Ct. of Fla., held that the Metro. Ct. was created and operates within the exclusive orbit of §11, Art. VIII, State Const., and that its judges deraign no part of their powers or duties under Art. V, State Const. So, it is clear that §1, Art. V, State Const., vests none of the judicial power of the state in the Metro. Ct. judges and, of course, a judge must be vested with a part of the state's judicial power in order for him to have authority to act as a committing magistrate with respect to state offenses.

Section 25, Art. V, State Const., provides that:

> All judicial officers in this state shall be conservators of the peace.

and our Sup. Ct. has apparently held that a circuit judge, as a conservator of the peace, is vested with the power and authority of a committing magistrate (*Ex parte* Sirmans, 116 So. 282, 284). Therefore, if a Metro. Ct. judge derived his powers from Art. V, State Const., it would seem that, since §25 thereof would make him a conservator of the peace, he would also be a committing magistrate. However, I point out as stated above, the Sup. Ct. held in Hall v. Strickland, *supra*, that none of the powers and duties of Metro. Ct. judges are deraigned from Art. V, State Const. Consequently, §25, Art. V, State Const., does not apply to Metro. Ct. judges.

Section 901.01, F. S., provides that:

> All judicial officers of this state shall be conservators of the peace and committing magistrates, ...

There is doubt as to whether Metro. Ct. judges would be "judicial officers *of this state*" even if §1, Art. V, State Const., had never come into being. (Emphasis supplied.) Be that as it may, said §1, as interpreted by the Sup. Ct., in Hall v. Strickland, *supra*, restricts the judicial power of the state, to courts and commissions other than the Metro. Ct. and when a judge acts as a committing magistrate in a case involving the violation of a state criminal statute, he necessarily exercises the judicial power of the state. Since the Metro. Ct. is not vested with such judicial power, a judge of said court has no authority to act as a committing magistrate in such cases. The result is that §901.01, F. S., does not make Metro. Ct. judges, committing magistrates.

I find no other provision of law which might be thought to authorize Metro. Ct. judges to act as committing magistrates in cases involving violations of state laws. Therefore, it is my opinion that they have no such authority and that your question is properly answered in the negative.

I am aware that my distinguished predecessor in office expressed a contrary view in AGO 060-144, rendered on Aug. 26, 1960. However, at the time of the rendition of that opinion, he did not have the benefit of the light which is cast on the problem by the Sup. Ct's. subsequent 1964 decision in Hall v. Strickland, *supra*, and I believe that the opinion which I have hereinabove expressed is compelled by the decision in that case.

065-97—August 18, 1965

INSURANCE

LIABILITY INSURANCE CONTRACTS—GOVERNMENTAL IMMUNITY, JURISDICTION OF COURT

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTION:

If the insurance carrier is willing to pay and does in fact tender full payment of the applicable limits of the liability insurance contract purchased by the board of public instruction of Hillsborough county, pursuant to the provisions of §455.06(1), F. S., 1963, does the court then have jurisdiction to proceed with a jury trial when the defense of governmental immunity is raised following such formal tender of payment of the applicable limits of such liability insurance coverage?

The state and its governmental subdivisions, including county school boards, are immune to tort action unless said immunity is waived to the extent of the amount of liability insurance which may be authorized.

If the county school board is properly insured and the insurance carrier has offered to pay the full amount of said coverage, it would seem pointless to insist on a trial since the amount of recovery would be limited by the amount of insurance carried.

It is my opinion that the judge of the court in which the suit is brought would necessarily have the duty of making a determination as to whether or not to take jurisdiction of the complaint or to dismiss the complaint under the circumstances set forth.

Your question is answered accordingly.

065-98—August 31, 1965

TAXATION

STOCK-IN-TRADE—GASOLINE AND LIKE PRODUCTS—MEASURE OF VALUE

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should taxes on gasoline and like products of petroleum, imposed by §§208.04 and 208.45, F. S., and by §4081, title 26, U.S.C., be included when determining the value of such products as stock-in-trade under §192.05, F. S.?

Attorney general Landis, by his letter of June 25, 1936 (1935-1936 AGO 47), and attorney general Ervin, by his opinion 059-111, dated June 18, 1959 (1959-1960 AGO 180-182), held that gasoline and lubricating oils were tangible personal property for purposes of ad valorem taxation. Such gasoline and like products of petroleum are tangible in nature and within the definition of tangible personal property contained in §200.01, F. S., as well as within the general definitions of tangible personal property in 73 C.J.S. 156, §5; 41 Words and Phrases, Perm. Ed., 151-154. Gasoline and like products of petroleum are clearly within the definition of "tangible personal property" contained in §200.01, F. S., and are taxable as such under Ch. 200, F. S.

It is provided in and by §192.05, F. S., that: "All personal property considered as goods, wares and merchandise commonly known as stock in trade, shall be assessed for the purpose of taxation by the counties, cities, villages, towns and taxing districts at a just valuation to be based upon the average value of the stock of goods, wares and merchandise, or stock in trade as held and owned over a period of twelve months next preceding the first day of January of the year for which the assessment is made . . ." The amendment of this section made by Ch. 61-295, was held unconstitutional in Franks v. Davis, Fla., 145 So.2d 228, and Ch. 65-296, is not effective until Dec. 31, 1965, and is not now applicable. Section 1, Art. IX, State Const., requires that taxable properties, both real and personal, be assessed on the basis of its just value.

Generally, stock-in-trade has been defined as merchandise or goods kept for sale or traffic, and includes such tangible personal property as is acquired and held primarily for resale, (84 C.J.S. 203, §88) which is usually assessed on the basis of its full value (84 C.J.S. 812, §412). Under §192.05, F. S., stock-in-trade is assessed on the basis of its average just value throughout the preceding year.

This brings us to the question of what is the measure of the just or fair market value of gasoline and like products of petroleum, for the purposes of ad valorem taxation, taking note of the fact that there is imposed on such products a federal excise tax of 4¢ per gallon (§4081, title 26, U.S.C.) and state excise taxes totaling 7¢ per gallon (§§208.04 and 208.45, F. S.) making a total excise tax on gasoline and like products of petroleum having a tax situs in this state of 11¢ per gallon. This poses the question of whether, when determining the value of gasoline and like products of petroleum, for purposes of ad valorem taxation, the amount of the taxes aforesaid should be added to the basic value of the gasoline or like product of petroleum.

Taxes on gasoline, other than that sold to the distributors within the purview of §208.04(2), F. S., are paid "upon the first sale or transfer within the state whether by distributor or dealer . . ." Under said §208.04(2), F. S., the taxes are due upon the sale or transfer of said gasoline or other products by said dealer licensed under said subsection (2). In neither case is the tax on the retail purchaser of the gasoline but upon the manufacturer, distributor or dealer making the sale of the said gasoline or like products of petroleum. Section 4081, U.S.C., imposes a gasoline tax of 4¢ "on gasoline sold by the producer or importer thereof," and §4091 of said title 26, U.S.C., imposes an excise tax on cutting oil and lubricating oils on the manufacturer or producer thereof. In United States v. Lee, 153 So. 94, 13 So.2d 919, the Sup. Ct. of Fla., held that the gasoline taxes imposed by §208.04, F. S., was a tax on the first sale or transfer of the gasoline in Florida, ". . . whether by a distributor or dealer, . . ." The gasoline taxes, under the Florida Statutes, become a part of the purchase price or value of such gasoline upon completion of the first sale or transaction thereof within the state.

See also Los Angeles Warehouse Co. v. Amer. Distilling Co., 22 Cal.2d 402, 139 P.2d 641, text 643; Consolidated Distributors, Inc., v. City of Atlanta, 193 Ga. 853, 20 S.E.2d 421; Williams v. Currie, 132 N.C. 300, 43 S.E. 896, text 897; Keilson Cigar Co. v. Braden, 59 Ohio App. 562, 18 N.E.2d 987; State v. Minnesota Tax Commission, 178 Minn. 300, 227 N.W. 43; Shearer v. Commissioner of Revenue, CCA2d; 48 Fed.2d 552, text 554; Dennick v. Miami Savings & Loan Co., 143 Ohio St. 461, 55 N.E.2d 794; Stewart's Estate v. Jersey City, 21 N.J. Misc. 149, 32 A.2d 190, text 192; Pierce and Hebner, Inc., v. State Tax Commission, 194 Md. 254, 71 A.2d 6, text 7; Lehman v. Iredell County Commissioners, 76 N.C. 115, text 116.

These cases tend to hold that taxes imposed and collected from manufacturers, distributors and wholesalers, under proper circumstances, become a part of the value of the products taxed in the hands of subsequent purchasers for many purposes.

This leads to the conclusion that excise taxes on gasoline and like products of petroleum, accruing and being payable upon the first sale or transfer thereof within the state, except as to such products sold by distributors qualified under §208.04(2), F. S., become part of the value of such gasoline and like products upon the completion of the said sale or transfer, for purposes of ad valorem taxation. Upon the sale or transfer of gasoline and like products of petroleum, by distributors qualified under §208.04(2), F. S., such taxes become part and parcel of the value of such gasoline and like products of petroleum. Federal gasoline taxes become part and parcel of the value of the gasoline and like products of gasoline, for ad valorem tax purposes, from and after their sale or transfer by the producer or manufacturer within this state.

Under both the federal and the state gasoline taxing statutes the taxes accrue upon the sale or other disposition of the gasoline. In some instances this tax may have accrued in another state so that such gasoline comes into this state burdened with such tax; in other cases only the federal tax will have accrued, but not the state tax; in other cases both the federal tax and the state tax will have accrued. Producers and importers owning retail outlets in this state will have paid or assumed no taxes until the making of the retail sale; in other cases only the federal tax will have been paid or assumed prior to the making of the retail or other sale; and in other cases both the federal and state taxes will have been paid or assumed prior to the retail sale. Assuming, for the purpose of this calculation only, that the basic value or values without taxes of the gasoline held as stock-in-trade is 12¢, then the value of the gasoline to which taxes have been added would be only 12¢, where the sales are made by producers and importers through retail stations; where only a 4¢ tax (federal) has accrued the value would be 16¢; and where both the state and federal taxes have accrued the value would be 23¢. This would result in some persons, firms or corporations having a value, for purposes of stock-in-trade, on their gasoline of 12¢ per gallon, others of 16¢ per gallon, and others of 23¢ per gallon. These valuations may under circumstances, for instance where producers or importers own and operate retail outlets, result in one retail dealer paying taxes on his or its gasoline as stock-in-trade of 12¢ per gallon, another, of 16¢ per gallon, and another, 23¢ per gallon, and such gasoline outlets might even be operating on the same street or same general location.

On the basis of these presumptions, 3 retail outlets might have their stocks-in-trade, on the basis of 100,000 gallons of gasoline, valued as follows: One at $10,000, another at $16,000 and the other at $23,000. For every $10 of taxes paid by the first dealer, the second would pay a

$16 tax and the third, a $23 tax, on the same volume of gasoline. This difference of valuation between similar gasoline dealers, in many instances operating under similar circumstances and conditions, would doubtless result in a burden or disadvantage to some of such dealers and an advantage to others. This poses a serious question of the equality and equal protection of the law as to such taxpayers.

Under the Fourteenth Amendment of the United States Constitution a state may not deny to any person the equal protection of the laws, and under §1, DR, State Const., "All men are equal before the law." This provision of the State Const., is applicable to valuations for purposes of taxation (German-American Lumber Co. v. Barbee, 59 Fla. 493, 52 So. 292). The fourteenth amendment of the U. S. Const. has, as one of its purposes, the distribution of the burden of taxation evenly and equitably as far as practical. (84 C.J.S. 76, §22). The valuation of stocks of gasoline owned and held for retail purposes as well as that owned and held for wholesale and other purposes, on the basis of different values when held for the same purpose, present serious constitutional questions, as to the valuation of such stocks-in-trade. This poses a serious question as to the use of the taxes paid on such gasoline in determining the value of stocks of gasoline in this state. We doubt the validity of such method.

Doubtless gasoline and like products held by producers and importers, by distributors and wholesalers, and by retail dealers have determinable valuations in the trade, varying as between each class of dealers. The average of such valuations, in the several areas of the state, which doubtless will vary from location to location, would appear to be a more adequate and equitable method of valuation than the inclusion of the taxes paid. The determination of these values appears to be more of an administrative matter than a legal matter.

065-99—September 2, 1965

WORKMEN'S COMPENSATION

ECONOMIC OPPORTUNITY ACT OF 1964—EMPLOYEES OF NEIGHBORHOOD YOUTH CORPS

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTION:

> **If federal funds are granted to the Broward county school board for the project termed "Neighborhood Youth Corps" under which students will spend a maximum of 10 hours a week in the school employment, receive $1.25 per hour for their services and may earn as much as $12.50 a week, are such students employees of the board of public instruction and entitled to the benefits of the Florida workmen's compensation law?**

Section 440.02, F. S., cited as the workmen's compensation law, provides relevant definitions, the pertinent parts of which provide that employment, subject to the other provisions of this chapter, means any service performed by an employee for the person employing him. The term employment shall include employment by the state and all political subdivisions thereof and all public and quasi-public corporations therein; employee means every person engaged in any employment under any appointment or contract or hire or apprenticeship, express

or implied, oral or written, including minors whether lawfully or unlawfully employed. Employer means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment.

As to whether employees of the county boards of public instruction are subject to the provisions of the Florida workmen's compensation act (Ch. 440, F. S.), see AGO 050-386; 049-135; and, 051-274.

To enable us to better understand the neighborhood youth corps program, we have obtained from the U. S. department of labor, a copy of its manual for the administration of the neighborhood youth corps projects under Pub. Law 88-452 (78 Stat. 528) cited as the economic opportunity act of 1964, which included a copy of the regulations promulgated by the secretary of labor pursuant to said law, and the general provisions regulating a neighborhood youth corps agreement between the federal government and a sponsor of such projects, the pertinent parts of which will either be quoted or referred to herein.

The neighborhood youth corps, an agency established by the secretary of labor within the department of labor to administer title I, part B of the act, *supra*, is to provide useful work experience opportunities for unemployed young men and women, through participation in state and community work-training programs, so that their employability may be increased or their education resumed or continued.

A sponsor of such projects must be either a state or local public agency or a private nonprofit organization under an agreement with the federal government whereby the government will reimburse the sponsor up to 90% of the allowable costs as set forth in the project budget.

The sponsor of these projects, be it state, county, or private (in this case the county school board), is charged with the responsibility of selecting and employing the applicants for work on the projects. The sponsor is responsible for appropriate work supervision of such students and they are paid with a county school board warrant the same as other employees of the school board are paid.

An enrollee, who is a youth, ages 16-22, employed in a project, shall receive compensation equal to not less than $1.25 for each hour spent in work; the conditions of employment, such as employee rights and benefits, must conform to all applicable federal, state and local laws, regulations, and rules.

Part B, of the manual, *supra*, relating to fringe benefits, provides that enrollees may be entitled to certain "fringe" benefits (enjoyed by regular employees), for which the employer must pay the cost, such as social security and unemployment compensation taxes, health benefits, insurance retirement contributions, and workmen's compensation. They are benefits over and above direct compensation, and their inclusion in the budget must be based on law, employer-employee agreement, or an established employment policy of the sponsor. The cost of such fringe benefits for enrollees will be reimbursed by the federal government if based on legislation or established employment policy and included in the budget estimates.

Section 50.26 of the rules and regulations promulgated by the secretary of labor pursuant to 78 Stat. 528 (Pub. Law 88-452), provides in subsection (b) thereof as follows:

> *Acceptable workmen's compensation insurance which meets 'existing requirements under State law' shall be provided for each enrollee and staff employee engaged on the project.* Such insurance shall provide, notwithstanding the absence of such a requirement under State law, for the payment of medical, surgical, nursing, and hospital services, medical and surgical ap-

paratus and appliances, and medicines which may be reasonably necessary to treat injury or disease arising out of and in the course of employment. Where the State law limits the liability of the employer in permanent total disability cases to a maximum dollar amount or to a specified period of time, such insurance shall provide benefits for the full period of such disability without regard to any maximum dollar limitation. (Emphasis supplied.)

Title I, part B, §114 of the act, *supra*, provides that enrollees in a project created thereunder, shall not be deemed federal employees and shall not be subject to the provisions of laws relating to federal employees, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and federal employee benefits. (See also Rule 50.14 of the regulations of the secretary of labor, relative to the enrollees in the neighborhood youth corps projects.)

In view of the foregoing, it is my opinion that enrollees in a neighborhood youth corps project, which is sponsored by a county school board, are employees of the said board and entitled to the benefits of the workmen's compensation law.

Your question is answered in the affirmative.

065-100—September 3, 1965
Revised—September 14, 1965

ELECTORS AND ELECTIONS

CLOSING OF REGISTRATION BOOKS PRIOR TO ELECTIONS

To: Mrs. Dixie Barber, Supervisor of Elections, Orlando

QUESTION:

In light of the recent legislative revision of the Florida election code, how long should the voter registration books remain closed prior to the holding of a bond election?

As I understand your inquiry, some uncertainty has arisen from the provisions of §97.081(5), F. S., which provides in part that the registration books shall be closed "at least *fourteen days* prior to the holding of any bond election" as contrasted with the amended provisions of §98.051(2), F. S., requiring the registration books to be closed "on the *thirtieth* (30th) *day* before each election," in light of the repeal of §100.231, F. S. (Emphasis supplied.)

It is a general rule of statutory construction that all acts of the legislature relating to the same subject matter should be read in *pari materia*, State *ex rel* McClure v. Sullivan, Fla., 43 So.2d 438; Sanders v. State *ex rel* Shamrock Properties, Fla., 46 So.2d 491; and Okaloosa Co. Water & Sewer Dist. v. Hilburn, Fla., 160 So.2d 43. In addition, it is another fundamental rule in construing legislative acts to consider their history, evils to be corrected, intention of the legislature, subject to be regulated and objects to be obtained. Singleton v. Larson, Fla., 46 So.2d 186. In this last regard, it should be explained that during the 1965 session of the legislature there was a substantial revision of the election code which was adopted upon recommendation of the legislative interim elections committee established under the provisions of Ch. 63-59.

It has been noted that in connection with the revision the legislature repealed §100.231, F. S., which formerly required the closing of the

voter registration books 14 days prior to a bond election. On the other hand, it is of equal interest to note that the legislature left intact the entire provisions of §97.081, F. S., while amending almost every other provision of that chapter. Section 97.081(5), F. S., provides in part that: "the registration books shall be kept open for at least thirty days and closed at least fourteen days prior to the holding of any bond election at which time a certified number of registered freeholders shall be available, as provided by law."

It must be presumed that the legislature had some purpose in repealing the 14-day provision of the former §100.231, F. S., while leaving intact the 14-day provision of §97.081(5), F. S., and the following observations of the Fla. Sup. Ct. in Sharer v. Hotel Corp. of America, Fla., 144 So.2d 813, appear helpful in reaching this conclusion:

> It should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation. Legislators are not children who build block playhouses for the purpose, and with the gleeful anticipation of knocking them down. It would be the height of absurdity to assume that the legislature intentionally prescribed a formula which creates the need for a Special Disability Fund, and in the next breath deviously destroyed its own handiwork . . .

Following the same theory, it would be likewise absurd to assume that the legislature intentionally removed the 14-day provision in the former §100.231, F. S., and then destroyed its own handiwork by allowing the 14-day provision of §97.081(5), F. S., to remain intact without purpose.

Reading §97.081, F. S., in its entirety gives hint to what the legislature had in mind by including unamended the provisions of §97.081-(5), F. S., in the revision. Section 97.081, F. S., specifically spells out the provisions for reregistration of freehold electors for bond elections and contains the authority under which school boards and boards of county commissioners may provide for reregistration. Thus it would appear that the legislative intent in incorporating the 14-day provisions of §97.081(5), F. S., in the revision was to allow for the registration books to remain open up to 14 days prior to an election in those instances where a reregistration of freeholders was being conducted. Presumably, the purpose in so doing was to allow more time to complete said reregistration prior to the closing of the registration books before a bond election.

On the other hand, in those instances where no reregistration is contemplated the legislature apparently intended that the registration books should be closed 30 days prior to an election as provided for in §98.051(2), F. S., which was amended as a part of the general election law revision.

It should not be overlooked that the provisions of §97.081, F. S., do leave some discretion with the officials charged with the responsibility of closing the registration books in that this section merely requires that the books be kept open for "at least thirty days" and then "closed *at least* fourteen days prior to the holding of any bond election." (Emphasis supplied.) Thus where those charged with the responsibility of establishing the dates for closing the registration books following a reregistration prior to a bond election are so inclined, and when in their wisdom and judgment it is determined to be in the best interest of the public, the registration books may still be closed 30 days prior to the holding of a bond election even where there is a reregistration. This interpretation appears to follow the rules of statutory construction stated above by taking into consideration the history of the revision, the objects to be obtained and gives effect to the apparent intent of the

legislature by reading each and every section of the statute involved in *pari materia*. In particular, this construction gives effect to the 14-day provision of §97.081(5), F. S., which remains while justifying the removal of the similar 14-day provision in the repealed §100.231, F. S.

Based on the foregoing argument and authorities, it would appear that where there is no reregistration of freehold electors, the registration books should be closed 30 days prior to the holding of a bond election. On the other hand, where there is a reregistration of electors as authorized under the provisions of §97.081, F. S., the registration books may remain open up until 14 days prior to the election although it is within the discretion of the election officials to close the books sooner as long as they are open for the registration of electors for at least 30 days prior to their being closed.

065-101—September 8, 1965

COUNTY EMPLOYEES

FURNISHING PROTECTIVE UNIFORMS TO PUBLIC EMPLOYEES FROM MOSQUITO CONTROL DISTRICT FUNDS

To: J. Hardin Peterson, Special Counsel for the Lee County Mosquito Control District, Fort Myers

QUESTION:

Does the board of commissioners of a county mosquito control district have the authority to provide protective uniforms for its employees engaged in the eradication of mosquitoes by the use of chemical means?

The duties which an employer owes to his employee will depend on the nature of the employment, the contract of employment which has been entered into between parties, and legislation which governs the relationship of employer and employee especially safety measures such as safety appliance acts. (35 Am. Jur., Master and Servant, §104, p. 532, and 21 Fla. Jur., Master and Servant, §23, p. 562.)

In view of the aforementioned, we should note that employment by the state and all of its political subdivisions thereof and all public and quasi-public corporations therein fall within the provisions of Ch. 440, F. S., that chapter concerning Florida workmen's compensation law. Furthermore, §440.56(1), F. S., provides as follows:

> Every employer, as defined in the workmen's compensation law, including employers who have elected not to accept the workmen's compensation law, shall furnish employment which shall be safe for the employees therein and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health and safety of such employees; provided that as used in this section 'safe' and 'safety' as applied to any employment or place of employment shall mean such freedom from danger as is reasonably necessary for the protection of the life, health and safety of employees or the public, including conditions and methods of sanitation and hygiene; and provided further that safety devices and safeguards required to be furnished by the employer by the provisions of this section or by the commission

under authority of this section shall not include personal apparel and protective devices that replace personal apparel normally worn by employees during regular working hours.

Section 388.161, F. S., sets out the powers and duties authorized under the Mosquito Control Ch., 388, F. S., the pertinent parts of which are as follows:

> The board of commissioners may do any and all things necessary for the control and elimination of all species of mosquitoes and other arthropods of public health importance and the board of commissioners is specifically authorized . . . to use oil, larvicide, paris green or any other chemicals approved by the state board of health . . .

It appears from the nature of the work involved in the eradication of mosquitoes that an individual employee in order to establish an accurate mosquito count must, daily at approximately the same time, wear sterilized clothes, uniform in color and texture. These clothes of necessity must be free of the residue of insecticides, pesticides and herbicides or the value of the count is useless. Furthermore, in the handling and applying of the various insecticides, pesticides and herbicides, said poisons permeate the employee's clothing and would be very injurious to the employee's health unless the clothing is changed daily.

Consequently, it would appear that some type of protective clothing would be required for the protection of the employee under the circumstances set out above, for example, care must be taken in the use of "paris green" in that it is "extremely poisonous." Blakiston's new gold medical dictionary, 1st Ed. 1949.

In light of the above discussion it appears that by the very nature of the type of work required in the eradication of mosquitoes that the supplying of work clothing to employees in the handling and dispensing of dangerous chemicals would be considered a proper use of mosquito control district funds and hence be an expenditure authorized by law inasmuch as said expenditure would not be for the personal benefit of an employee but would be for his personal protection in keeping with the workmen's compensation law.

065-102—September 9, 1965

REGULATION OF TRAFFIC ON HIGHWAYS

METHOD FOR DETERMINING WIDTH OF PNEUMATIC TIRES

To: F. K. Strickland, Secretary, Weight Review Board, State Road Department, Tallahassee

QUESTION:

> **What is the appropriate method for determining the width of pneumatic tires used on cement mixers, dump trucks, concrete mixing trucks and other similar trucks designed and constructed for such uses?**

Section 317.961, F. S., provides in part:

> Dump trucks, concrete mixing trucks, fuel oil and gasoline trucks designed and constructed for special type work or use . . . shall meet the requirements of this section as to load limits.

The requirements of §317.961, F. S., as to load limits provide in part that "such vehicles or combination of vehicles shall not exceed five

hundred fifty pounds per inch *width of tire* surface." (Emphasis supplied.)

Chapter 65-487 amends §317.011(62), F. S., to provide:

> 317.011 *Definitions.*—
>
> (62) TIRE WIDTH.—Tire width shall be that width stated on the surface of the tire by the manufacturer of the tire.

At first blush it would appear that the terms of the above-quoted definition of tire width would in all cases answer your question as set out above and in those cases where original equipment tires bearing the uniform standard markings of the tire manufacturer are in use, said markings should be determinative of the tire width.

The problem here has, however, been complicated with the marketing of the flotation tire recently adapted to commercial vehicle use. In most cases the flotation tire is a modified airplane tire which has been remanufactured or retreaded for vehicle use. In many cases the manufacturer's tire size markings are obliterated or covered up by the remanufacture or retreading process and in those cases where the numbers are left they generally designate aircraft tire sizes which are not measured and marked by the same standards used for measuring and marking vehicle tires.

It is a general rule of statutory construction to construe statutes so as to give them a practical operation and effect. Latham v. Hawkins, 121 Fla. 324, 163 So. 709. In an effort to give a practical application to the new definition section found in §317.011(62), F. S., it would appear that where tires do not bear the standard vehicle size markings of the original manufacturer, they should be physically measured by the same standards adopted by major commercial tire manufacturers and approved by the rubber manufacturers association for measuring and marking original equipment vehicle tires. It is understood here that the generally accepted method of measurement is to measure the tire at its widest point. Accordingly a size 18.00 tire would be 18 inches across its widest point when measured inflated and standing on the ground.

While the provisions of §317.011(62), F. S., provide that the "Tire width shall be that width stated on the surface" said markings on the tire can only be considered prima facie evidence of the correct tire size and where the size stamped on a tire does not appear to reflect the true size of the tire a physical measurement of the tire according to accepted standards of tire measurement would be admissible for determining the actual size of the tire in question.

This conforms to the administrative interpretation which has been placed on §§317.961 and 317.011(62), F. S., both by the department of public safety and the state road department and it is a well-established rule of statutory construction that administrative rulings are of considerable persuasive force and will not ordinarily be disturbed by the courts unless clearly erroneous or unauthorized. See Harvey v. Green, Fla., 85 So.2d 829; Green v. Home News Publishing Co., Fla., 90 So.2d 295; Volusia Jai-Alai, Inc. v. McKay, Fla., 90 So.2d 334; Florida Indus. Comm. v. Manpower, Inc., of Miami, Fla., 91 So.2d 197; L. B. Smith Aircraft Corp. v. Green, 94 So.2d 832; State By and Through Ervin v. Massachusetts Co., 95 So.2d 902, cert. denied, 78 Sup. Ct. 147, 335 U. S. 881, 2 L. Ed. 2d 112; Green v. Stuckey's of Fanning Springs, Inc., Fla., 99 So.2d 867; Florida State Racing Comm. v. McLaughlin, Fla., 102 So.2d 574; Craig Funeral Home, Inc. v. State Farm Mut. Auto Ins. Co., 280 F.2d 337, and Miller v. Brewer Co. of Fla., 122 So.2d 565.

Accordingly, this office is inclined toward the position that the appropriate method for determining the width of a pneumatic tire used

on dump trucks, concrete mixing trucks, fuel oil and gasoline trucks is to accept the width stated on the surface of the tire by the manufacturer unless there is no such number or unless the number stated does not appear to reflect the true tire size in which case a physical measurement of the tire at its widest point should be accepted.

Your question as set out above is answered accordingly.

065-103—September 10, 1965

REGULATION OF VOCATIONS AND PROFESSIONS

CHAPTER 487, FLORIDA STATUTES, PESTICIDE ACT—EFFECT OF OMISSION FROM CHAPTER 65-457, LAWS OF FLORIDA, AMENDING SAID CHAPTER

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

QUESTIONS:

1. What is the legal effect of the omission of a portion of subsection (1) and all of subsections (2) and (3) of said §487.101, F. S., as amended, from senate bill 876, and the inclusion of said portions in house bill 1584, for which said senate bill 876 was substituted on second reading in the house of representatives?

2. If the omitted portion of senate bill 876 may not be supplied to become a part of Ch. 65-457, please advise if the commissioner of agriculture has authority to adopt as a rule the provisions contained in the original draft but omitted in the senate bill, namely a portion of subsection (1) and all of subsections (2) and (3) of §487.101, F. S., as amended by Ch. 65-457?

House bill 1584 of the regular session of the Florida legislature of 1965 was introduced and read the first time on May 11, 1965, and was referred to the house committee on agriculture. On May 18, 1965, the committee made a favorable recommendation and the same was placed on the calendar for second reading. (1965 house journal 608, 609 and 828). On May 29, 1965, "On motion of Mr. Karst, the rules were waived by a two-thirds vote and Senate Bill 876 was read the second time by title, and the third time in full and passed, title as stated." The roll call vote was 90 for and 0 against. (Journal 1240 and 1241). Except for the omission of a portion of subsection (1) and all of subsections (2) and (3) of §487.101, F. S., as above-mentioned, the introduction of senate bill 876 of the 1965 regular session of the Florida legislature appears to have been regular and without incident. (Senate journal, pp. 343, 511, 639, 679, 686, 815, 1121, 1122 and 1240).

It is clear from the procedures in both the senate and house of representatives that house bill 1584 and senate bill 876, of the 1965 regular session of the Florida legislature, were intended to be companion measures which are defined in rule 7.11 of the rules and manual of the house of representatives of the state, of said legislative session as follows:

> A companion measure shall be in the identical words as the measure for which it is being substituted. At the moment the House passes the Senate companion measure, then the House measure shall be regarded as automatically tabled.

From facts above-mentioned and discussed it is readily evident that house bill 1584 and senate bill 876 of the 1965 regular session of

the Florida legislature were not cast in identical words, by reason of the omission of a portion of subsection (1) and all of subsections (2) and (3) of §487.101, F. S., as amended by Ch. 65-457, from senate bill 876 while house bill 1854 contained said portion of subsection (1) and all of said subsections (2) and (3).

Hillsborough County v. Temple Terrace Assets Co., Inc., 111 Fla. 368, 149 So. 472, involved what appears to have been intended as companion bills, wherein the title of one of the companion bills described its application to counties having a stated population, according to the last preceding census, while the other companion bill described its application to counties of the same population bracket, according to the 1920 census, which was the last preceding census as of the date of the enactment of the act in question. The reference to the last preceding census has in this state been held to be progressive, picking up each successive census. The court, in this case, held that neither version of the two bills passed both houses of the legislature, their application being legally different, and held the purported act invalid.

In State v. Skaley, 108 Fla. 506, 146 So. 544, the court had under consideration Ch. 12197, 1927, relating to the practice of "podiatry," and found, upon an examination of the legislative records that it was derived from senate bill 87, of the regular session of the Florida legislature. The journal entries of the senate relative to senate bill 87 show a legislative title relating to the practice of podiatry, except as to one entry where the reference was to the practice of pediatry. The journal entries of the house of representatives, relative to senate bill 87 in the said house, show a legislative title in all but one entry to the practice of pediatry, and in that one entry to the practice of podiatry. The court held that the legislative journals failed to show that said senate bill 87 had passed both houses, this holding being based on the different meanings of the words *"podiatry"* and *"pediatry."* (Emphasis supplied.) The act was held invalid upon a failure of the legislative records to show that it passes both houses as required by the State Const.

In State v. Deal, 24 Fla. 293, 4 So. 899, a bill containing 31 sections was introduced into and passed by the senate and certified to the house, which amended the said bill into one of 8 sections instead of the 31 sections, and passed the same and certified it back to the senate, which evidently concurred in the same; however, in enrolling the said bill there were included §§9 to 31 of the original bill, eliminated by the above-mentioned amendment. The court held the enrolled bill invalid in toto because of the inclusion of said §§9 to 31 therein, on the basis that the enrolled bill had not been enacted by both houses. The question of whether or not the first 8 sections might have been upheld on the basis that they had been enacted by both houses was not discussed by the court; however the court did hold the entire enrolled bill to have been invalid.

From the above and foregoing we must hold §487.101, F. S., as amended by Ch. 65-457, not having been enacted by both houses of the legislature, invalid and without force and effect. The above authorities, in the light of the following facts and observations, pose the further question of the constitutionality and validity of Ch. 65-457, in its entirety, which we will discuss next.

The purpose of Ch. 65-457, appears from its title, which is as follows:

> An act relating to pesticides and pesticide devices; amending and revising chapter 487, Florida Statutes; providing definitions, prohibited acts, registration, labeling, inspection,

technical committee, rules, penalties and injunction; repealing sections 487.01 through 487.12 of chapter 487, Florida Statutes, providing an effective date.

This title shows an intention to amend and revise Ch. 487, F. S., relating to pesticides and pesticide devices, and regulate the sale and use thereof in Florida. An examination of the house and senate bills as introduced, as well as said Ch. 65-457, shows an intention to amend said Ch. 487, F. S., not its sections—section by section. Section 16, Art. III, State Const., permits the amendment of the act or law or any section, subsection or paragraph thereof. Here the legislature elected to amend or revise the entire chapter of the statutes, not some section, subsection or paragraph thereof. In such case "the act as revised or section, subsection of a section, or paragraph of a subsection of a section, as amended, shall be reenacted and published at length." In the preliminary paragraph of said Ch. 65-457, as well as in the senate and in the house bills, it is provided that: "Chapter 487, Florida Statutes, is amended and revised to read:" after which is set out the amended chapter, section by section. There is no separate paragraph or provision in the amendment or law providing that any of the existing sections of the statute "be amended or revised to read as follows," with the section or sections being set out following or after such a paragraph. The title to the act, as well as the bills introduced in each house of the legislature, relates to the amendment of an entire chapter of the Florida Statutes—not to the amendment of a section or sections. The body of the chapter as amended by the house and in the senate differs as to the amendment offered in each house, in that the proposed amendment of the chapter in the senate (senate bill 876) omits a material portion of the companion amendment in the house; the amendment in the house contains a portion of a paragraph, and two other paragraphs, in proposed §487.101, F. S., not included in the senate amendatory act. If we consider Ch. 65-457, as well as senate bill 876 and house bill 1584, 1965, as being amendments of a chapter, as distinguished from the amendment of sections, subsections or paragraphs, then the chapter as amended by the senate differs from the amendment of the house. We would be dealing with a different legal question had both houses of the legislature elected to amend the said Ch. 487, F. S., section by section, instead of using the chapter as the unit of amendment or revision. The unit of amendment used in both houses (amending Ch. 487, F. S., not the several sections thereof separately) was the chapter of the statutes; this being true, the chapter as amended, by reason of the omission in amended §487.101, F. S., in the senate bill, did not contain language included in the house bill.

There appears to have been a technical violation of §16, Art. III, State Const., in that the entire bill voted on by the senate differed from the one pending in the house, to the extent pointed out above, thereby presenting a serious constitutional question going to the validity of Ch. 65-457. It has long been the policy of this office to leave to the courts the determination of the constitutionality of legislative enactments and statutes. It is, therefore, our suggestion that the question concerning the validity of said Ch. 65-457, be presented to a court of competent jurisdiction. Reference is made here to State v. Gray, 153 Fla. 462, 14 So.2d 721, where mandamus was employed to cause certain language improperly included in an enrolled bill to be directed to be stricken.

This brings us to question 2, dealing with the powers of the commissioner of agriculture to make and promulgate rules and regulations similar to those contained in the omitted portion of §487.101, F. S., in said senate bill 876. Question 2, poses the question of the authority of

the commissioner of agriculture to substitute administrative rules and regulations for and in lieu of proposed §487.101, F. S., above discussed and determined to be invalid because not enacted in both houses as required by the State Const. Our Sup. Ct. in Richardson v. Baldwin, 124 Fla. 233, 168 So. 255, text 256, stated that:

> It is settled law that the legislature cannot delegate the power to make a law or to declare what the law is or to exercise an unlimited discretion in applying the law. It may enact a law complete in itself to accomplish a public purpose and may authorize designated officers within defined limitations to prescribe rules and regulations for its enforcement . . .

See also, to the same effect, Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789, text 793; Arnold v. State, 140 Fla. 610, 190 So. 543, text, 544; Hutchins v. Mayo, 143 Fla. 707, 197 So.2d 495, text 496.

In Hutchins v. Mayo, *supra*, the Sup. Ct. of Fla., said that: "Where a statute of this state empowering boards, bureaus or commissions to promulgate rules is in question 'the test. . . .is whether or not the act defines a pattern by which the rule or regulation must be made to conform'." To the same effect, see also Arnold v. State, *supra*, So. text 496.

In 16 C.J.S. 580 and 581, §138, it is stated that:

> The legislature may not vest executive officers or boards with uncontrolled discretion in making rules and regulations and must establish sufficient standards for their guidance. However, having established a sufficiently definite policy, standard or rule, the legislature may authorize an administrative officer or body to make rules, regulations or orders relating to the administration or enforcement of the law, and give to such rules and regulations binding force and effect of law.

The apparent invalidity of said Ch. 65-457, leaves Ch. 487, F. S., as the same existed at the time of its introduction in the legislature and at the time of the purported enactment of said Ch. 65-457, in force and operation. Section 487.09, F. S., 1963, appears to have remained in force and effect. The material portions of the matter omitted from senate bill 876, except the penal provisions in subsection (2), contained in §487.101, thereof, appear to be contained in said §487.09, F. S., 1963, which remained in force by reason of the invalidity of said Ch. 65-457. Under §487.05, F. S., which remains in force because of the invalidity of said Ch. 65-457, provision is made for the adoption and promulgation of the rules and regulations therein contained. It seems possible that the omitted language from §487.101, F. S., as amended by said Ch. 65-457, with the exception of the last sentence of subsection (2), containing penal provisions, might be the subject of a rule or regulation.

065-104—September 16, 1965

ELECTORS AND ELECTIONS

USE OF FACSIMILE SIGNATURE BY SUPERVISOR OF ELECTIONS ON REGISTRATION IDENTIFICATION CARDS

To: Mrs. Dixie Barber, Supervisor of Elections, Orlando

QUESTION:

> **May a supervisor of elections affix a facsimile signature to the registration card to be furnished each elector under the provisions of §97.071, F. S.?**

Section 97.071, F. S., provides in part:

A registration identification card shall be furnished all electors registering under the permanent registration system and shall contain:

* * * * *

(11) Signature of registration officer.

"In the absence of a statute prescribing the method of affixing a signature, it may be affixed in many different ways. It may be written by hand, and, generally, in the absence of a statute otherwise providing, it may be printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached to another. A signature lithographed on an instrument by a party may be sufficient for the purpose of signing it, and it has been held or recognized that it is immaterial with what kind of an instrument a signature is made." (80 C.J.S. 1292-4, signatures, §7.) This rule has in many cases been extended to the documents signed by public officials. (See 80 C.J.S., 1295-6, signatures, §9.)

"Historically, the ordinary signature was a crossmark, and while today signing is usually accomplished by writing one's name the crossmark has not entirely disappeared. Available today also are machines and stamps for affixing signatures. The method of affixing the signature would not seem important, if the intention is that it constitute the true signature of the maker." McGrady v. Munsey Trust Co., D.C. Mun. App., 32 Atl.2d 106.

Section 97.071, F. S., quoted above does not within its own terms appear to require a personal signature of the registration officer on each registration card to be furnished to the elector and since Florida recognizes the use of facsimile signatures (See §116.34, F. S., and AGO 057-159) there would not, in light of the above-cited authorities, appear to be any legal impediment which would prohibit the use of a facsimile signature of the supervisor of elections on the registration card provided for in §97.071, F. S.

It is also a general rule of statutory construction to interpret statutes so as to give them a practical operation and effect. (Latham v. Hawkins, 121 Fla. 324, 163 So. 709) and thus it appears appropriate to consider not only the legal interpretation but also the practical application and effect of such an interpretation. First, the card provided for in §97.071, F. S., is nothing more than an identification card which is furnished to each elector at the time he registers. There is no obligation on the part of the elector to keep the card nor is he required to show it at any time in the future in order to prove his eligibility to vote or establish his registration although possession of such a card could, because of the information contained thereon, serve to facilitate the establishment of an elector's registration status should he ever encounter any difficulty in this regard. Second, in the event of a reregistration in a large county a supervisor might be called upon for the almost impossible task of personally having to sign as many as 50,000 such cards in a 30-day period.

Thus, considering the evidentiary worth of the registration identification card, it would appear from both a practical and legal standpoint that there would be no need for a personal signature of the supervisor of elections on the card and a facsimile signature printed thereon would appear to meet every requirement of the law.

In the event a supervisor of elections desires to use a facsimile signature, it is suggested that he or she comply with the requirements of §116.34(3), F. S., by "filing with the Secretary of State his manual signature certified by him under oath . . ." This may be done at the

same time the supervisor's seal is filed with the secretary of state as required by §98.161(5), F. S.

Accordingly, in light of the above-cited comments and authorities, your question as set out above is answered in the affirmative.

065-105—September 20, 1965

PUBLIC HEALTH

FLORIDA BARBITURATE ACT—EXEMPTIONS

To: Frank S. Castor, Director, Bureau of Narcotics, State Board of Health, Jacksonville

QUESTION:

> **Are the exemption provisions of §404.04, F. S., applicable to a Florida registered pharmacist who is under the influence, and in the actual possession, of a barbiturate or amphetamine drug, and the delivery of said drug was made by the pharmacist to himself not pursuant to a prescription, nor was the delivery for medical or scientific purposes?**

For the purposes of the discussion which follows, I shall assume the facts to be that a registered pharmacist lawfully acquired barbiturates or central nervous system stimulants in his capacity as a pharmacist and that he consumed a part of these drugs and was found in possession of another part under circumstances showing that he had the same in his possession for his own personal use and not for use in the usual course of his business or practice or in the performance of any official duty; also, that he did not obtain such possession on the written prescription of a practitioner and did not obtain the same by direct delivery from a practitioner for bona fide medical use.

I do not think that §404.02(1), F. S., is applicable to these facts. That subsection makes it unlawful to deliver or cause to be delivered barbiturates or central nervous system stimulants except under stated conditions. Section 404.01(3), F. S., defines "delivery" as follows:

> (3) The word 'delivery' means selling, dispensing, giving away, leaving with, or supplying in any other manner.

I think that under this definition, the delivery contemplated by §404.02(1), F. S., must be from one person to another and that such delivery does not occur when a pharmacist dispenses drugs to himself. (See 11 Words and Phrases 664.)

However, under the facts stated above, the pharmacist violated §404.02(4), F. S., which reads as follows:

> (4) The actual or constructive possession or control of a barbiturate or a central nervous system stimulant *by any person* unless such person obtained such drug on the written prescription of a practitioner or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use, and except as provided in §404.04. (Emphasis supplied.)

The words "by any person," as used in the quoted statutory provision, include pharmacists as well as other persons.

It is noted that said quoted provision ends with the words "except as provided in §404.04, F. S." I do not think that §404.04, F. S., provides any exemption in such circumstances. The pertinent parts of §404.04, F. S., read as follows:

404.04 *Exemptions, additional.*—The provisions of §404.02(1) and (4) shall not be applicable to:

(1) The delivery for medical or scientific purposes only of barbiturates or central nervous system stimulants to *persons included in any of the classes hereinafter named,* or to the agents or employees of such persons, *for use in the usual course of their business or practice or in the performance of their official duties, as the case may be,* or

(2) The actual or constructive *possession* or control of barbiturates or central nervous system stimulants *by such persons* or their agents or employees for such employees *for such use* to-wit:

(a) Pharmacists. (Emphasis supplied.)

A reading of subsection (2) of the above-quoted section alone could possibly lead one to the conclusion that possession of barbiturates or central nervous system stimulants by the persons referred to therein would be lawful, notwithstanding the fact that the possession was not obtained pursuant to a prescription or directly from a medical practitioner for a bona fide medical use. Such a conclusion, in my opinion, would be erroneous since it is a general rule of law that a statute must be read and applied as a whole and not section by section. (See Scenic Hills Utility Co. v. City of Pensacola, 156 So.2d 874, 1963.)

The words "for such use" in §404.04(2), F. S., refer to the use theretofore mentioned in subsection (1), that is, "for use in the usual course of their business or practice or in the performance of their official duties, as the case may be." The result is that the above-quoted portion of §404.04(2), F. S., has the same meaning as though it read as follows:

(2) The actual or constructive possession or control of barbiturates or central nervous system stimulants by such persons or their agents or employees for such employees *for use in the usual course of their business or practice or in the performance of their official duties, as the case may be,* to-wit:

(a) Pharmacists. (Emphasis supplied.)

When a pharmacist possesses barbiturates or central nervous system stimulants for his own personal consumption, he does not possess the same for use in the usual course of his business or practice or in the performance of any official duty. Therefore, §404.04, F. S., does not exempt him from the provisions of §404.02(4), F. S., and the latter section makes his possession unlawful if he did not obtain the drugs for his personal use on the written prescription of a practitioner or by direct delivery from a practitioner for bona fide medical use.

In other words, I think that when a pharmacist lawfully acquires barbiturates or central nervous system stimulants for use in his profession, but not on a written prescription and not by direct delivery from a practitioner for bona fide medical use by such pharmacist, his possession becomes unlawful when he ceases to hold possession of such barbiturates or central nervous system stimulants for use in the usual course of his business or practice or in the performance of some official duty and, instead, holds possession for some other purpose such as, for instance, for his own personal use and consumption.

Your question is answered in the negative.

065-106—September 20, 1965

EDUCATION

PROPOSED MILLAGE—OPERATION OF COUNTY SCHOOL SYSTEMS

To: Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May a county board of public instruction use public funds to purchase paper, envelopes, stamps, and other printed materials to distribute information to qualified electors about the district millage election, as well as recommending that the electors vote in favor of the proposed millage?

2. May a county board of public instruction use public funds to distribute factual information describing current programs in the county?

AS TO QUESTION 1:

Section 10, Art. XII, State Const., provides that the legislature may divide counties into convenient school districts and for the levying and collection of a district school tax for the exclusive use of public free schools within the district where a majority of the qualified electors vote in favor of such levy. Section 8, Art. XII, State Const., provides that: "Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three (3) mills, not more than ten (10) mills on the dollar on all taxable property in the same."

Chapter 230, F. S., provides for the control, organization and administration of the county school system. Section 230.38, F. S., provides for the biennial election for trustees of any school district on the first Tuesday after the first Monday in November of odd-numbered years, at which time the school district tax levy should be voted on as set forth in Chs. 236 and 237, F. S. Section 230.39, F. S., sets out the procedure for conducting biennial school district elections, and provides that the county board shall publish notice of election once each week for 4 successive weeks, in some newspaper of general circulation in the county.

There appear to be no specific statutory provisions authorizing expenditures by the county board of public instruction for the purchase of paper, envelopes, stamps and other printed materials, to distribute information to qualified electors about the district millage election. However, §230.23(11)(b), F. S., provides that the county board shall approve annual budgets recommended by the county superintendent, and authorize expenditure of funds within the budget. Section 230.23 (18), F. S., provides that the county board shall exercise and perform such duties as may be assigned to it by law or as in the opinion of the county board are necessary to provide for the more efficient operation of the county school system in carrying out the purposes and objectives of the school code.

Generally county school funds must be used for current operating expenses, and special tax school district funds for current operating expenses, buildings, repairs, etc., and when a fund is voted for other school purposes, the legislature is powerless to otherwise direct it and if not pledged for other purposes, the board of public instruction has implied authority to use such funds for buildings, repairs, permanent

equipment, and other school purposes. State v. Board of Public Instruction for Dade County, 126 Fla. 142, 170 So. 602 (1936).

Thus it seems reasonable to assume that the use of public funds to purchase paper, envelopes, stamps, and other printed materials would be justified in order to inform qualified electors within the district about the impending district millage election. This is in addition to the notice of election to be published in the county newspaper. It would appear that a recommendation either for or against such proposed millage would be prohibited since the county board of public instruction is a statutory body and should not be involved with political matters of this nature. This seems to answer question 1.

AS TO QUESTION 2:

The above suggestions would also apply to the use of public funds to distribute factual information describing current programs in the county and would be justified in an effort to keep qualified electors advised of current school programs.

However, as is stated in 15 McQuillin, Municipal Corporations, p. 55, §39.21, "An out and out effort to propagandize or obtain a favorable result in an election is not a proper expenditure of municipal funds." The same rule is applicable to the expenditure of county or other public funds. (23 Fla. Jur. 101, §74.)

065-107—September 21, 1965

STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM

RIGHT OF RETIREE TO CHANGE BENEFICIARY DESIGNATED PURSUANT TO §122.08, F. S.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

May a state or county officer or employee, retiring under and pursuant to §122.08(3), F. S., and designating his wife as beneficiary under said subsection, upon divorcing his said wife or being divorced by her, and having remarried, designate a substitute beneficiary in lieu of the one designated as aforesaid?

Section 122.08(3), F. S., provides that:

> Any state or county officer or employee shall have the right at any time prior to receipt of his first monthly installment of retirement compensation to receive a reduced retirement compensation with the provision that if such officer or employee dies after retirement compensation installments have commenced the *excess, if any, of his total contributions made to the retirement fund*, without interest, over the retirement compensation received by him shall be paid in accordance with the beneficiary designation of this law. The amount of such reduced retirement compensation shall be the actual actuarial equivalent of the amount of such retirement compensation otherwise payable to him. (Emphasis supplied.)

There appears in your file furnished us with your request for opinion, a document signed by the retiree containing the following, "I hereby certify that I have not retired under any other Retirement System or Plan. I select Option No. 3," and acknowledged by the retiree on Feb. 18, 1960, before a notary public. There also appears in your

file a copy of a letter from your office to the retiree wherein you indicated that the retirement benefits of the wife, in case of the death of the retiree, would amount to approximately $105.78 per month during the remainder of her natural life. Your calculation sheet indicates the same amount. This indication of compensation to the retiree's wife in the amount of $105.78 per month so long as she may live indicates an election to retire under option 4, instead of option 3, as provided for in §122.08, F. S., in that option 3 provides merely for the payment of unused contributions, not retirement compensation as does option 4.

Nowhere in §122.08(3), F. S., or for that matter nowhere in said section, do we find any statutory provision for the changing of beneficiaries therein provided for, similar to the provision contained in §122.12, F. S., wherein it is provided that:

> Any officer or employee may file, in writing, a designation of beneficiary and it shall be the duty of the comptroller to refund one hundred per cent, without interest, of the contributions made to the retirement trust fund by such deceased officer or employee to such designated beneficiary. The officer or employee shall have the privilege of changing in writing, the designated beneficiary at any time . . .

Here we are not dealing with contributions to the retirement trust fund, but to retirement compensation due the retiree or his designated beneficiary to receive the retirement compensation designated in said §122.08, F. S.

It may be well to give some thought to the history of §122.12, F. S., which section appears to have been derived from §13, Ch. 29801, 1955, as amended by Chs. 57-364 and 61-119, 1957 and 1961. Chapter 29801, 1955, was designed to and had the purpose of consolidating Chs. 121 and 134, F. S., which first chapter provided for state retirement and the latter for county retirement. An examination of Chs. 121 and 134, F. S., 1953, the last codification prior to the consolidation and merger of said Chs. 121 and 134, F. S., into Ch. 122, F. S., reveals that §122.12, F. S., 1953, was derived from §§121.10 and 134.10, F. S., 1953, which were substantially identical in language used, except for the fact that §121.10, F. S., related to state officers and employees and §134.10, F. S., to county officers and employees. Section 121.10, F. S., provided that, "Should any state officer or employee *die before being eligible to retire* under the provisions of this law, the heirs, legatees, beneficiaries or personal representatives of such deceased officer or employee of the State of Florida shall be entitled to a refund of one hundred per cent, without interest, of the contributions made to the Retirement Fund by such deceased officer or employee . . ." The remainder of the section made provision for the naming of a beneficiary to receive such contributions in lieu of the above-mentioned persons.

In State v. Gay, Fla., 41 So.2d 893, one Helen Phillips Welch, had more than 10 years of service credit with the state which would have enabled her to retire under said Ch. 121, F. S., had she been of sufficient age to retire under said chapter. After severing her employment with the state Mrs. Welch sought a refund of her contributions to the said retirement system fund. It was held that §121.10, F. S., did not permit a refund of contributions after a service credit of 10 years or more had been acquired. Subsequent statutes have made some change in this section as brought into Ch. 122, F. S., as §122.12, F. S.; however, said §122.12, F. S., is primarily a provision for the appointment of a beneficiary to receive contributions in those cases where the member of the retirement system never reaches retirement age or never retires, including the presumptive retirements provided for in §122.08, F. S.

Section 122.12, F. S., does not provide for the designation of beneficiaries to receive retirement pay under §122.08, F. S., except to the extent provided for in said §122.08, F. S. Section 122.08(3), F. S., insofar as it provides for a beneficiary relates to unused contributions of those who elect to retire under said subsection, not to retirement compensation.

In the case of life insurance, whereby a policy contains no provision authorizing a change of beneficiary by the insured, it has usually been held that the beneficiary has a vested interest in the policy from its issuance, delivery and acceptance which cannot be divested without such beneficiary's consent. (Stringfellow v. Alexander, 96 Fla. 1, 117 So. 899, text 900; 29 Am. Jur. 981, et seq., §§1314 et seq.; 46 C.J.S. 69, et seq., §175.) This same rule has been applied to pensions and retirement compensation which constitute vested rights (16 C.J.S. 1234-1242, §252), and which are not in fact gratuities. There being no provision in §122.08, F. S., or elsewhere in Ch. 122, F. S., provisions for changing beneficiaries under the subsections of said section, we doubt that beneficiaries designated under §122.08(3), F. S., may be changed after the retirement of the retiree, at least without the consent of the said beneficiary.

The compensation of the beneficiary under §122.08, F. S., being in most if not all cases, dependent upon actuarial equivalents, any change in the beneficiary from the one originally designated to a new designee would require the calculation of a new actuarial equivalent, at least in most cases if not all cases. This leads us to doubt that §122.08(3), F. S., should be or may be construed as permitting the substitution of beneficiaries.

This leads to a negative answer to the above-stated question. In the light of this answer, (a) a divorce between a retired state employee and his wife, who has been designated as beneficiary under option 3 of said §122.08, F. S., would not bar the said wife from receiving benefits under said subsection (3) in case of the death of the retiree; (b) a retired state or county employee is not, under present statutes, entitled to change beneficiaries after having designated one under said option 3. This does not apply to beneficiaries designated under §122.12, F. S.

065-108—September 21, 1965

EDUCATION

COUNTY SCHOOLS—AUTHORITY OF COUNTY SUPERINTENDENT TO PREPARE COUNTY SCHOOL BUDGET

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Does a county board of public instruction have legal authority to employ a fiscal expert to prepare their budget regardless of the wishes of the county school superintendent and without consulting with the superintendent as to his proposed budget or his wishes in the selection of personnel who are to assist in preparing the budget?

Section 237.09, Florida Statutes, as amended in 1965, provides in part:

> On or before July 15 of each year, the county superintendent of each county, after tentatively ascertaining the policies of the county board regarding the school program and the

budget for the ensuing year, and after consulting with the principals of the various schools or with supervising principals to determine needs, shall prepare as accurately as possible an estimate of the cost of the program including all obligations to be met and necessary reserves, the balances and income to be available, and the tax levies needed during the next ensuing fiscal year which estimates shall be prepared in proper form to constitute the tentative budget for the county as prescribed below.

Section 230.23(5)(b), F. S., provides that a county board shall "act on written recommendations submitted by the county superintendent of persons to act as administrative, supervisory, technical, attendance or health assistants, his office assistants, and bus drivers and appoint persons to fill such positions."

In view of the above-cited statutory provisions, it is my opinion that since the superintendent has the legal responsibility for preparing a budget for consideration of the board, if technical assistance is necessary in the performance of this duty the superintendent should recommend the person or persons employed for this task and that the board should not ignore said recommendation.

065-109—September 24, 1965

EDUCATION

SCHOOL MILLAGE ELECTIONS—WRITE-IN VOTES

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Where voting machines are used in biennial school district millage elections, should a write-in slot be provided?

Prior to 1965 §236.32(3), F. S., provided a form of ballot which allowed the voter the alternative of pulling a lever for the recommended millage or writing in any other millage. Illegibility and numerous other factors brought about a great deal of confusion concerning the counting of the write-in ballots and thus in an effort to alleviate this problem the legislature in 1965 amended §236.32(3)(b), F. S., by Ch. 65-427 to read in part:

> 2. In districts where automatic voting machines shall be used:
> INSTRUCTIONS TO VOTERS: The proposed millage levy for the school term as proposed by the county board is _____ mills. If you favor the proposed millage, so indicate by depressing the 'for' lever located directly over (under) the proposed millage. *If you favor a different millage levy, from 0 mills through 10 mills, so indicate by depressing the 'for' lever over (under) the millage you favor.* (Emphasis supplied.)

As can be seen from the above-quoted amendment to the statute relating to voting machines, the legislature has in effect provided that in addition to a lever for the recommended millage there shall be 11 more levers for the mills 0-10.

The question now occurs as to how an elector expresses himself on a voting machine when he wishes to vote for a fractional millage other than the recommended millage, i.e., assume the recommended millage is 5 mills and an elector wishes to vote for 6½ mills. The

legislative implication in the language that there shall be levers 0-10 is that each of the 11 levers shall be for the purpose of casting a vote for a whole number millage and thus the legislature either overlooked the possibility that someone might wish to cast a vote for a fractional millage or else it intended there would be write-in spaces for casting votes for fractional millages, or it has been suggested by some that the legislature intended that the elector be restricted to voting for the recommended millage or a whole number millage between 0-10. It is the last possibility as to whether the voter should have an opportunity to write in a fractional millage which prompted the request for this opinion.

The question appears to be one of first impression in Florida insofar as restricting an elector in casting a write-in vote for a school millage. The issue has, however, been before the courts with regard to ballots on which there was an attempt to restrict electors from writing in the names of candidates and the rule in this state appears to be that "The legislature cannot restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot; he must be left free to vote for whom he pleases, and the Constitution has guaranteed to him this right." (11 Fla. Jur. 420, Elections, §95, citing State *ex rel* Lamar v. Dillon, 32 Fla. 545, 14 So. 383, 22 L.R.A. 124.)

In the Dillon case, *supra*, the court said at 14 So. 394:

> . . . That phase of the act, then, which restricts the voter to checking the name of some candidate on the official ballot, is in conflict with the constitutional provision in reference to voting by ballot.

At 29 C.J.S. 551, Elections, §180, the comment is made that: "Subject to constitutional prohibitions or restrictions, statutes prohibiting write-in voting or limiting the right to vote in this manner have been held to constitute a proper exercise of the legislative power, although there is authority to the effect that the legislature has no power to prohibit write-in voting."

In those instances where the prohibitions were held to be a proper exercise of legislative power, the statutes specifically prohibited writing in votes which is not the case in the instant situation. On the other hand, in the cases cited for the proposition that there is authority to the effect that the legislature has no power to prohibit write-in voting, the court said:

> A voter has the constitutional right to vote for whomever he pleases and, if the names of the candidates on the printed ballot do not meet with his approval, he may 'write in' the name of the person whom he desires to have elected to the office. State ex rel. v. Kozer, 112 Or. 286, 229 P. 679; Hendricksen v. Clark, 102 Or. 250, 201 P. 1071; State ex rel. v. Thompson, supra (134 Neb. 739, 279 N. W. 462); Adair v. McElreath, 167 Ga. 294, 145 S. E. 841; 18 Am. Jur. 307, Elections, § 191; 29 C. J. S., Elections, § 180, p. 263. As said in McCreary on Elections, 4th Ed., 508, § 700: 'Statutes which deny the voter this privilege are in conflict with the constitutional provisions guaranteeing the right of suffrage to every citizen possessing the requisite qualifications and are void. Legislatures may provide for the printing of an official ballot and prohibit the use of any other, but they cannot restrict the elector in his choice of candidates, nor prohibit him from voting for any other than those whose names appear on the official ballot. (See Howell v Bain, 176 Or. 187, 156 P.2d 576, at 582.)

In 18 Am. Jur. 307, Elections, §191, it is concluded that:

> . . . The majority view, however, seems to be that a statute prohibiting the writing in of names of candidates upon the ballot is unconstitutional, and in most states the insertion of names of candidates upon the ballot is permitted.

In Florida writing in the names of candidates is specifically authorized in the general election laws, see §97.021(9), F. S., as amended by Ch. 65-60. Section 236.32(1), F. S., speaking of biennial school district millage elections says "all school district elections shall be held and conducted in the manner prescribed by law for holding general elections."

As a practical matter it should also be noted that §236.32(3), F. S., as amended by Ch. 65-427, authorizes a person casting a paper ballot to vote for the recommended millage or in the alternative write in his choice of a different millage. Thus, it would appear that any person who by chance is afforded the opportunity to cast a paper ballot and who does not wish to vote for the proposed millage, would not be restricted to writing in a whole number alternative. Therefore it would appear to be arbitrary and discriminatory to prohibit those persons residing in counties where voting machines are used from expressing their opinion as freely and fully as their contemporaries who by chance have the opportunity to cast a paper ballot.

Thus drawing the appropriate analogies from the authorities, statutes and observations set out above, it would appear that if school elections are to be conducted under the law applicable to general elections and the legislature cannot under those laws restrict an elector to voting for a candidate whose name appears on the ballot, then likewise an elector cannot be precluded from writing in a fractional millage of his choice between 0 and 10 and thus a write-in slot for fractional millages should be provided.

These conclusions tend to follow the rule that "All statutes tending to limit the citizen in the exercise of the right to vote should be liberally construed in his favor." (See State v. Saxon, 30 Fla. 668, 12 So. 218 at 224.)

I realize that it may have been the legislative intent to eliminate the write-in slot on voting machines in millage elections for the reasons spelled out in §236.32(3)(b)2., F. S. The legislature did not, however, effectively and specifically express this intent to prohibit write-in voting in the manner approved in the cases cited above. Thus the above-cited authorities compel the conclusion reached herein notwithstanding the speculation as to the original intent of the legislature to preclude a write-in vote on a voting machine in school millage elections.

Your question is answered in the affirmative.

065-110—September 27, 1965

EDUCATION

COUNTY SCHOOLS—FAILURE OF CONTRACTOR TO COMPLETE CONTRACT

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Where a contractor has failed to complete a construction project within the period required in a contract with a county

school board, and the surety on the contractor's bond is required to complete the project, does the said county board have discretionary authority to waive the provisions for a penalty in the contract when in fact the said board has suffered no damage?

Attorney general's opinion 060-41, March 2, 1960, rendered by my predecessor in office, points out that while §235.32, F. S., "contemplates a penalty clause in all construction contracts of the county board, . . . if the penalty clause is arbitrary and capricious, *with no relationship to the actual damages suffered*, it may be held void if challenged in court." (Emphasis supplied.) I concur in and reaffirm that opinion.

The purpose of a penalty provision in school construction contracts is to assure compliance with the terms of the contract. In the situation you describe, although the contractor defaulted and the surety on the contractor's bond was required to complete the project, the terms of the contract were substantially complied with and the building satisfactorily completed. You state that "the board has actually suffered very little, if any, on account of the project not being completed within the contractual period."

On the basis of the foregoing, I am of the opinion that under the circumstances outlined in your letter, the county board has the inherent discretionary power derived from its statutory contractual powers, to waive the "penalty clause" or provisions for liquidated damages if in fact no actual damages have been sustained as a result of the failure to complete within the time specified in the contract.

Your specific question is accordingly answered in the affirmative.

065-111—September 27, 1965

CRIMINAL LAW

BAIL BONDS—NOTICE TO BONDSMAN

To: C. Burton Marsh, Clerk Circuit Court, Sumter County, Bushnell

QUESTIONS:

1. In the event of a continuance of more than 72 hours, is the clerk required to give notice?

2. If the answer to question one is in the affirmative, is the clerk required to give notice to the defendant personally in the event he is:

a. Released on his own recognizance, or

b. Posts his bond in cash?

Section 2 of Ch. 65-492, amends §903.26 to provide, among other things, that:

> Before a bail undertaking is forfeited it shall be shown that (a) the information or indictment was filed within six (6) months from the date of arrest, and in addition, (b) that the bondsman or surety was given seventy-two (72) hours or more notice exclusive of Saturdays, Sundays and holidays before the time of required appearance of the defendant; such notice to be given by the clerk of the court having jurisdiction of the defendant. No notice need be given if required appearance is within seventy-two (72) hours from the time of arrest or specified time of appearance is stated on the face of the bond.

The above section, in clear language, requires as a condition precedent to bail forfeiture that the bondsman or surety receive a minimum

72 hours notice exclusive of Saturdays, Sundays and holidays before the time of required appearance of the defendant.

It is assumed that your query stems from a situation where the defendant has appeared at the designated time and that the case is continued at the request of the defendant, the prosecution or the court for a period in excess of 72 hours.

In view of the clear and unequivocable pronouncement of the legislature that notice be given by the clerk of the court having jurisdiction of the defendant prior to forfeiture of the undertaking, it is my opinion that the clerk would be required to give additional notice where there has been a continuation in excess of 72 hours.

Pursuant to the holding in Summit Fidelity & Surety Co. v. State, 166 So.2d 757, wherein it is noted that:—"Assuming that court clerk failed to perform certain ministerial acts regarding docketing of criminal charge and proper filing of criminal case against principal on bond, where it did not appear that surety on bond was in any manner prejudiced thereby and was not deprived of statutory option to surrender defendant-principal on bond, failure to perform any ministerial acts would not affect obligation of bond."—it does not appear that the liability of the bail bondsman or surety would be affected by the lack of the notice after continuance. Particularly does this appear so where both the defendant and the surety or bail bondsman were before the court and had actual notice of the continuance.

It is my further opinion that where an individual has been released on his own recognizance the notice required by said section need not be given. Nor does this section require notice where an individual posts a cash bond.

065-112—September 29, 1965

TAXATION

APPLICATION OF §193.03, F. S., TO SCHOOL DISTRICT MILLAGES FIXED BY ELECTION UNDER §10, ART. XII, STATE CONST.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. In those counties where school district tax millage elections, under §10, Art XII, State Const., were held at the general election in 1964, do the rollback provisions of §193.03, F. S., as amended in 1963, have any application?

2. If the answer to the first question is in the affirmative, is there statutory or constitutional authority which authorizes millage increases after the millage rollback under said §193.03, F. S., as amended in 1963?

Section 10, Art. XII, State Const., provides for the establishment of county school districts and for the election biennially of school trustees and:

> . . . for the levying and collection of a district school tax, for the exclusive use of public free schools within the district, whenever a majority of the qualified electors thereof that pay a tax on real, or personal property shall vote in favor of such levy; Provided, that any tax authorized by this section shall not exceed ten mills on the dollar in any one year on the taxable property of the district.

Doubtless the purpose and intent of this constitutional provision was to fix a limitation upon the millages to be levied for public school purposes in the several counties of the state.

Although the Sup. Ct. of Fla., in Chase v. Board of Public Instruction, Fla., 52 So.2d 122, text 124, held that it was beyond the power of the county budget commission to reduce the millages fixed by the taxpayers of the county who "pay a tax on real or personal property" under and pursuant to §10, Art. XII, State Const., the court held that §236.33, F. S., "authorizes the board of public instruction to reduce the tax levy approved by the freeholders if it is shown that there are ample available funds for school purposes from other revenue sources." Section 236.33, F. S., which provides for the certifying of tax millages by the county school boards to the assessors of taxes contains the following:

> Provided, however, that the county board, with the consent of the state superintendent of public instruction, where it is plainly manifest from the county school budget that there are ample funds from other school revenue sources to meet the requirements of the obligations of the tax school district, may reduce the tax approved by the voters in the school district election.

Both the above expression of the Sup. Ct. of Fla., and the proviso in said §236.33, F. S., demonstrate that school millages imposed by the voters, under §10, Art. XII, State Const., are in the nature of a limitation on millages and not a millage binding on the school board under all circumstances.

In the light of these observations we feel that the Florida legislature has the power and authority to protect the taxpayers against excessive taxation in those cases where there have been material general increases in the level of tax valuations to just values of taxable property, when prior assessments have been made upon a ratio of assessed value to just value materially less than just value, as contemplated by §1, Art. IX, State Const., and §193.021, F. S., as a protection of the taxpayers and to prevent excessive school expenditures. In addition, we feel that under such circumstances, where the effect of following the millages as voted would result in excessive taxation, that a court of chancery would have jurisdiction to intervene and supervise the same.

Under this construction of §10, Art. XII, State Const., we find no prohibition against the Florida legislature requiring a rollback of millages voted under §10, Art. XII, State Const., in proportion to any general increase of tax valuation to just value, as required by §1, Art. IX, and §7, Art. X, State Const., as construed in Cosen Investment Co., Inc., v. Overstreet, 154 Fla. 416, 17 So.2d 788; State v. McNayr, Fla., 133 So.2d 312, text 314; McNayr v. State, Fla., 166 So.2d 142, text 144; Walter v. Schuler, Fla., 176 So.2d 81, text 85.

Question 1 is answered in the affirmative, subject to our observations concerning question 2.

The Florida legislature, by §§237.05-237.22, F. S., has provided a comprehensive public school budget system and procedures to be followed and complied with by county public school officials, as well as other officers charged with the assessment and collection of county school and school district taxes, which such taxing officials are required to follow and conform to, except to the extent that such statutes may conflict with constitutional provisions and subsequent statutes and laws. Section 193.03, F. S., replaced temporarily those provisions in §§237.05-237.22, F. S., relative to school budgets and taxation, which

were in irreconcilable conflict with said §193.03, F. S. Said §§237.05-237.22, F. S., were derived from §§1063-1080, Ch. 19355, 1939, and subsequent amendments, extensions and changes thereof or thereto made by subsequent legislatures. The said 1939 act appears to have been, insofar as taxation is concerned, patterned after Ch. 18134, 1937. County and district school officials and taxing authorities are required to follow the requirements of §§237.05-237.22, F. S., except to the extent that said sections may be in conflict with subsequent acts of the legislature.

Section 193.03, F. S., as amended in 1963 (the 1965 law is not effective until Jan. 1, 1966) appears to have conflicted with said §§237.05-237.22, F. S., if at all, only in that it requires a rollback of existing millages in proportion to any general increase in the level of tax valuations to just value, which provision continues until 1973, and fixed certain limitations upon millage increases beyond the rollback millages required by said §193.03; however, this limitation was made applicable only to the 1963-1964 and 1964-1965 fiscal years. Taxes for the 1963-1964 fiscal year were imposed on the 1963 tax rolls and for the 1964-1965 fiscal year, on the 1964 tax roll. Millages now being determined are for the 1965-1966 fiscal year and will be assessed on the 1965 tax roll, and are not within the millage control provisions of §193.03, relative to the 1963-1964 and 1964-1965 fiscal years. The millage control provisions of §193.03, F. S., other than the rollback provisions, expired with the 1964-1965 fiscal year. We are now in the 1965-1966 fiscal year. The said millage control provisions, applicable after the millage rollbacks, are contained in a proviso appended to the millage rollback requirements and should be construed as a proviso.

The operation of a proviso is usually and properly confined to the portion of the enactment which immediately precedes it, in this case the millage rollback provision. (82 C.J.S. 882-889, §381). The millage control provisions of §193.03, F. S., other than the millage rollback provision which is applicable over a 10-year period, apply only to the 1963-1964 and 1964-1965 fiscal years, so that they merely suspended conflicting statutes only for such fiscal years, so that such provisions merely suspended portions of said §§237.05-237.22, F. S., for the said 2 fiscal years, and did not repeal the same. (82 C.J.S. 521 and 522, §304). Upon the running of the said 1963-1964 and 1964-1965 fiscal years the millage control provisions of §§237.05-237.22, F. S., again became applicable and control for fiscal years subsequent to the 1964-1965 fiscal year. "The school fiscal year shall begin on July 1 and shall end at the close of June 30 in each and every year." (§228.041(19), F. S.). This answers question 2.

In the light of Chase v. Board of Public Instruction, Fla., 52 So.2d 122 and 124, and the proviso in §236.33, F. S., we are inclined to the view that millages imposed by a county board may not be increased beyond the millage voted in an election under §10, Art. XII, State Const., as we construe here the millage voted to be in the nature of a limitation on the board and not the fixing of a millage which may not under any circumstances be changed by the county school board or by district trustees.

Question 1 is answered in the affirmative, subject to our discussion of the said question; and question 2 is answered by the statement that upon the expiration of the millage control provisions (which is distinguished from the rollback provisions of said section) in §193.03, F. S., as amended in 1963, the applicable provisions of §§237.05-237.22, F. S., again became applicable and should be conformed to when determining school and school district millages for the tax year of 1965.

065-113—September 29, 1965

TAXATION

LIMITATIONS UPON TAX LIENS AND TAX SALE CERTIFICATES OF MUNICIPALITIES

To: Roy T. Rhodes, City Attorney, Tallahassee

QUESTION:

> **What is the period of limitation applicable to the enforcement of municipal ad valorem tax liens when the municipality's legislative charter or charter acts fixes no such limitation nor authorizes the municipality to fix such a limitation?**

Although the above question is directed to municipal tax liens generally, we will take note of applicable provisions in the charter and charter acts of the city of Tallahassee, as the same appear from the "City of Tallahassee, Code, 1957," which we have examined.

In Florida tax liens are creatures of statute, there being no common law tax liens, so that such liens do not exist, even on the property assessed, unless made so by statute. (31 Fla. Jur. 210, §330; 84 C.J.S. 1080, §585; 51 Am. Jur. 881, §1010). Section 192.21, F. S., provides that:

> All taxes imposed pursuant to the constitution and laws of this state shall be a first lien superior to all other liens on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment . . .

This provision originated as a part of §1, Ch. 10040, 1925; and was repeated in the amendment thereof by §1, Ch. 14572, 1929, and by §2, Ch. 17442, 1935, each of which amended said §1, Ch. 10040, 1925, to read as therein set out, as well as in §1, Ch. 20722, 1941, which appears to have been a general revision of the law as reflected by the above-mentioned laws. Said laws were brought into the Florida Statutes, 1941, as §192.21, thereof, which section was amended and revised in §1, Ch. 22079, 1943, and has remained in the said Florida Statutes as said §192.21. Section 101, Ch. 8374, 1919, relating to the city of Tallahassee and its ad valorem taxes upon real and personal property, is in substance the same as said §192.21, F. S. The lien under the general law as well as under the Tallahassee municipal charter is the same in effect. Under each such statute the lien continues until discharged by payment.

Section 1, Ch. 28270, 1953, added §95.021 to Ch. 95 F. S., which provided that:

> The provisions of existing law, whether provided for in this chapter or any other chapter of the Florida Statutes, whereby an action is barred if not commenced within twenty years, shall apply to any action by the state, or any of its agencies, or by any officer or persons on behalf of the state or any of its agencies, or by any county or municipal corporation of the state.

The said section, at the time of its enactment, contained a provision allowing a period of 1 year from the effective date thereof within which to bring actions or claims then more than 20 years old. However, this provision was deleted and repealed by §24, Ch. 57-1, 1957. Said Ch. 28270, 1953, as amended by said §24, Ch. 57-1, now appears as §95.021, F. S. Said §95.021, F. S., was held applicable to special assessment liens in Ware v. City of Miami, Fla., App. 132 So.2d 446, and certiorari was

denied by the Sup. Ct. in 140 So.2d 302. Prior to the enactment of said §95.021, F. S., the Sup. Ct., in Ideal Farms Drainage District v. Certain Lands, 154 Fla. 554, 19 So.2d 234, held that there was no limitation upon the liens of drainage district assessments, in effect holding that such liens continued until paid. It seems reasonable to believe that §95.021, F. S., changed this rule if such liens in the hands of persons, firms and corporations are subject to limitation. Section 196.12, F. S., may be such a provision; we will next examine this section.

Section 196.12, F. S., was derived from §§1-3, Ch. 19515, 1939. This section is divided into three parts; first, it fixes a 20-year limitation on tax liens and certificates issued after the effective date of said Ch. 19515, 1939, which appears to have been June 12, 1939; second, it fixed a 20-year limitation on tax liens and certificates issued prior to its effective date but which were not twenty years old on that date; and third, it fixed a 20-year limitation on tax liens 20 years old or more on said effective date. The said section is as follows, insofar as here material:

> *Limitation upon lien of tax certificates.*—A period of twenty years is declared to be the life of any tax certificate issued against any lands in the state, whether issued for state and county taxes or issued by a municipality for municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, such period of twenty years to be reckoned from the date of the issuance of such tax certificate; and when such certificate becomes twenty years old, reckoned from the date of its issuance, the same shall be deemed and held to be barred by this statute of limitation and no action on such certificate shall be maintained by any such private holder in any court of this state, and no tax deed shall issue thereof. This section shall not be construed so as to make it unlawful for the state or any municipality to sell to third persons or private purchasers, tax certificates which become twenty years old after the effective date of chapter 19515, acts 1939, but as to all such tax certificates which are so sold and which become twenty years old after said act became a law, and as to all tax certificates, now held by the state or any municipality, which are already twenty years old, and which may be sold, the purchaser or purchasers shall be limited to five years from the date of purchase of such certificate or certificates in which to apply for a tax deed or institute other action for recovery on or enforcement of such certificate or certificates.

The second paragraph of this section has been omitted because it is applicable only to Murphy act certificates, which do not include municipal tax liens and certificates.

Tax sale certificates held by individuals as of June 12, 1939, as well as all such certificates purchased or held by individuals up to this date in 1945, would be 20 years or more in age. Under §196.12, F. S., as such tax sale certificates purchased by individuals, firms and corporations, as of the date of the enactment of said §196.12, F. S., as well as any such certificate or certificates acquired by them prior to this date in 1945, would be barred by said §196.12, F. S. Section 95.021, F. S., imposes the same limitation on the state and its counties and municipalities as §196.12, F. S., imposes upon persons, firms and corporations. In other words, said §95.021, F. S., makes §196.12, F. S., applicable to the state and its counties and municipalities, in addition to "private

holder, natural or corporate, partnership, trustee, estate of deceased person . . .," mentioned therein.

We, therefore, reach the conclusion that §196.12, F. S., as implemented by §95.021, F. S., of the said statutes, provides a 20-year statute of limitation for tax sale certificates held by the state, or any county or municipality thereof. The same conclusion would appear to be reached if §194.58, F. S., as well as §194.59, F. S., are construed as having been implemented by said §95.021, F. S. The preamble to Ch. 23828, 1947, from which said §194.58, F. S., was derived, seems to indicate that said §194.58, F. S., was intended as a provision for the cancellation of those tax sale certificates within the purview of §196.12, F. S., thereby indicating that said §196.12, F. S., may have been a statute of nonclaim and not strictly a statute of limitation.

065-114—October 4, 1965

ELECTORS AND ELECTIONS

QUALIFICATIONS OF ELECTORS PARTICIPATING IN SCHOOL MILLAGE AND TRUSTEE ELECTIONS

To: Mrs. Agnes M. Goethe, Supervisor of Elections, Brooksville

QUESTIONS:

1. What qualifications must an elector meet to be eligible to participate in a school trustee election?

2. What qualifications must an elector meet to be eligible to participate in a school millage election?

3. May freeholders whose real property is homestead exempt from taxation and who pay no personal property tax participate in a school millage election?

4. Are electors who pay personal property taxes eligible to participate in a school millage election if they do not own real property and do not pay ad valorem taxes thereon?

AS TO QUESTION 1:

Section 236.32(4), F. S., as revised during the 1965 session of the legislature by Ch. 65-427, now provides in part:

> *All qualified electors* residing within any school district in the state whose voting registration is in that district shall be entitled to vote in the election of trustees . . . (Emphasis supplied.)

In amending the statute the former requirement that electors be taxpayers to vote on school trustees was deleted and there is now no requirement that they be taxpayers or freeholders in order to vote in the trustee election.

All persons who meet the simple requirements of §1, Art. VI, State Const., and §97.041, F. S., (that is, persons 21 years of age by election day, residing in the state for 1 year, and in the county for 6 months, who are mentally competent and not confined in jail or prison) and who are duly registered electors in the district may participate in the election of school trustees.

AS TO QUESTION 2:

Section 236.32(4), F. S., as revised during the 1965 session of the legislature by Ch. 65-427, now provides in part:

> . . . such qualified *electors who pay a tax on real or personal property* within the district shall be entitled to vote in the election to set the school tax district millage levy. (Emphasis supplied.)

In amending the statute the requirement that electors be taxpayers to vote on the school tax millage levy was left unchanged. This requirement is substantially as set out in §10, Art. XII, State Const., which provides:

> The Legislature may provide for the division of any county or counties into convenient school districts; . . . and for the levying and collection of a district school tax, for the exclusive use of public free schools within the district, whenever a majority of the qualified electors thereof *that pay a tax on real, or personal property* shall vote in favor of such levy; . . . (Emphasis supplied.)

As you can see from the above constitutional and statutory provisions, to be eligible to participate in a millage election an elector must, in addition to being registered, pay a tax on real or personal property. It is this element of paying taxes that is the distinguishing factor between eligibility to participate in trustee elections discussed in question 1 and eligibility to participate in millage elections discussed here in answer to question 2. See AGO 051-246, p. 403 of the 1951-52 biennial report of the attorney general, and 045-259, p. 412 of the 1945-46 biennial report.

It is important to note that the taxes must not be merely assessed but they must in fact be paid. It was concluded in AGO 061-174, p. 295 of the 1961-62 biennial report of the attorney general, at p. 297, that "payment of taxes on real or personal property for the current year or the year next preceding the election" would qualify an elector to participate in a millage election. It was further concluded therein that a previously registered elector who pays taxes between the time the registration books close and the date of the election may establish his eligibility as a taxpaying elector on election day by completing the certificate described in that opinion and in AGO 051-377, p. 405 of the 1951-52 biennial report of the attorney general. See also AGO 0-594, 1939-40 biennial report of the attorney general, p. 156.

Accordingly, the answer to question 2, reduced to its simplest terms is that a person who is properly registered to vote and who actually pays a tax on real or personal property is eligible to vote in a millage election.

AS TO QUESTION 3:

In answer to question 3, the payment of taxes on real or personal property is to be distinguished from the mere ownership of real estate which entitles one to be registered as a freeholder. The millage election is not a freeholder election. By way of explanation, I direct your attention to the observations in AGO 0-594, *supra*, wherein it was stated at p. 158:

> If a person is exempt from payment of taxes on all of his property, whether real or personal, in a district for any reason whatsoever, he is not eligible to vote in a special tax school district election.

Neither the statute nor constitutional provisions have been substantially changed since the issuance of that opinion which was affirmed in AGO 045-259, *supra*, and is reaffirmed here.

Accordingly, a freeholder whose real property is homestead exempt and whose personal property is otherwise exempt from taxation and does not therefore pay taxes on real or personal property, is not considered a taxpayer so as to be eligible to participate in a school tax district millage election. A person whose property is subjected to ad valorem taxes to pay off bonded indebtedness is considered a taxpayer and therefore eligible to participate in a school tax district millage election. See AGO 0-594, *supra*, at p. 159.

On the other hand, a person whose property is subject to taxation only as a result of a special assessment is not considered an ad valorem taxpayer eligible to participate in a school tax district millage election. By way of explanation, an ad valorem tax and a special assessment, though cognate in immaterial respects, are inherently different in their controlling aspects. "As there are no 'special assessments' authorized by the constitution . . ." (State v. Henderson, 13 Fla. 666, 188 So. 351, text 354). A special assessment is like a tax in that it is an enforced contribution from the property owner but it is inherently different and governed by entirely different principles. It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of the value of the property. See Orlando v. State, Fla., 67 So.2d 673, texts 674 and 675, and Klemm v. Davenport, Fla., 129 So. 904, at 907.

Thus those electors who pay no personal property tax and who own real property which is subject only to special assessments but not subject to general ad valorem taxation are not eligible to participate in a school tax district millage election even though they may qualify as freeholders and would therefore be eligible to participate in bond elections. It is this distinction between mere ownership (freehold status) and the status of a taxpayer which distinguishes between an elector's eligibility to participate in a millage election as opposed to eligibility to participate in a bond or freeholder election.

It is of interest to note here that it is the rule and was held in AGO 047-372, p. 294 of the 1947-48 biennial report of the attorney general, that the spouse of a qualified taxpaying elector is not eligible to vote by operation of the law where that spouse does not pay taxes on real or personal property. It was said there:

> When a statute requires the payment of a tax on real or personal property within the district as one of the qualifications, it has reference not to the person actually making the payment but to a person paying taxes on his own property or for whose account such taxes are paid. If the title to property stands in the joint name of husband and wife, the payment of a tax assessed against such property would be a payment of taxes for the account of both husband and wife, but if title is in only one of them, then the payment would be for the account of that one alone.

See also AGO 0-594, *supra;* 049-563, p. 203 of the 1949-50 biennial report, and 053-244, p. 96 of the 1953-54 biennial report of the attorney general.

In conclusion a freeholder whose real and personal property is totally exempt from taxation or who pays real property taxes only in the nature of special assessments is not eligible to participate in a school tax district millage election.

Accordingly, question 3 is answered in the negative.

AS TO QUESTION 4:

Your attention is directed to the provisions of §10, Art. XII, State Const., which provides in part:

> The Legislature may provide . . . for the levying and collection of a district school tax . . . whenever a majority of the qualified electors thereof that pay a tax on real *or* personal property shall vote in favor of such levy; . . . (Emphasis supplied.)

Likewise, §236.32(4), F. S., provides in part:

> . . . such qualified electors who pay a tax on real *or* personal property within the district shall be entitled to vote in the election . . . (Emphasis supplied.)

As you can see from the above-quoted constitutional and statutory provisions, the requirement that a person pay taxes on real or personal property is in the alternative and thus an elector who pays a personal property tax is not required to own property or pay ad valorem taxes thereon in order to participate in a school millage election.

The question as to the payment of taxes on personal property is more easily explained than is the payment of taxes on real property for the personal property taxes are fewer. Granted there are personal property tax exemptions up to $1,000 under the provisions of §11, Art. IX, State Const., and §192.201, F. S., and a person who does not pay personal property taxes because of the exemptions or otherwise would, like the person whose real property is homestead exempt, not be eligible to participate in a millage election. Assuming however, that an elector pays a tax on personal property he would then be eligible to participate in a school millage election.

Taxes on intangible personal property have been held to be an ad valorem tax, Florida National Bank of Jacksonville v. Simpson, Fla., 59 So.2d 751 at 758, and thus taxes so paid qualify an elector to participate in a millage election. See AGO 0-594, *supra.* On the other hand, the payment of excise taxes such as sales, license or privilege taxes do not by themselves entitle an elector to vote in a millage election.

Under the statute it does not matter that the taxes have been assessed, the important thing to qualify thereunder is that the taxes have been paid prior to the date of the holding of the election in order that the elector may be eligible to participate in the election. As pointed out above in the answer to question 2, it has been concluded that taxes paid during the current year or the year next preceding the election qualify the elector to participate in a millage election and in the event an elector pays his taxes between the time the registration books close and election day, then he should be allowed to establish his eligibility as a taxpayer on election day by completing an affidavit as described in AGO 061-174 and 051-377, *supra.*

Question 4 is answered in the affirmative.

065-115—October 11, 1965

COURTS

JUVENILE—ISSUANCE OF "HOLD" ORDER TO RETURN JUVENILE OFFENDERS FOR FURTHER PROCEEDINGS AFTER DETENTION

To: Robert E. Lee, Jr., Judge, Juvenile Court, DeLand

QUESTIONS:

1. Is it within the authority of a juvenile court to issue a "hold" order for the purpose of having a juvenile who has been adjudicated by the juvenile court returned for further proceedings relating to offenses committed after adjudication but prior to arrival at the state industrial school?

2. If the answer to question 1 is in the affirmative, to whom should such order be addressed?

The answer to these questions must be arrived at by an examination of the provisions of Ch. 39, F. S., which sets forth the jurisdiction and authority of the juvenile courts in the state.

From the facts which you have submitted to me, it is my understanding that it became necessary for you to commit 2 juveniles, ages

15 and 14, to the Florida school for boys pursuant to the provisions of §39.11, F. S. While the juveniles in question were being detained in the Volusia county juvenile detention home awaiting acceptance by the Florida school for boys, they both managed to escape. While at large, these boys committed several acts of auto theft and various other burglaries which amounted to violation of the law as defined by §39.01-(12), F. S.

Because of these new offenses, committed after an adjudication in your court, you wish to bring the juveniles in question back before your court after they are released from the Florida school for boys and conduct further proceedings with reference to the new offenses which are described in your request for this opinion.

An examination of Ch. 39, F. S., does not indicate that the juvenile judge has the authority to issue a "hold" order as such in a case where he has committed a delinquent child to the Florida school for boys. Therefore, question 1 must be answered in the negative. However, the provisions of §39.11(3), F. S., appear to provide a means for accomplishing this purpose, and reads as follows:

> (3) Any commitment made to an industrial school shall be for an indeterminate period of time, any child so committed to be released when directed by the board of commissioners of state institutions rather than upon the order of the juvenile court committing the child, but no child shall be held in an industrial school under a commitment from a juvenile court after becoming twenty-one years of age. The juvenile court, in committing a child, shall not lose jurisdiction, but shall discontinue exercising active control over the child while the child is committed to the school. The board of commissioners of state institutions shall notify the juvenile court which committed the child to the school, at least thirty days before releasing the child, and the juvenile court may thereupon resume control and thereafter make orders for the supervision of the child as may be proper.

It can be seen from this section of the Florida Statutes that while a juvenile is committed to an industrial school the committing juvenile court does not lose jurisdiction over the child in question but merely discontinues exercising active control over the child. Further, it is provided that the board of commissioners of state institutions, which does exercise active control over the child while he is committed, must notify the committing juvenile court within 30 days before the child in question is released; upon release from the industrial school, the committing juvenile court may resume control over the child and thereafter issue whatever orders it deems proper in the case of the child in question.

Since the court retains jurisdiction over a child committed by it to an industrial school and resumes active control over that child upon his release from the said industrial school, it will be possible for you to consider the offenses committed by the juveniles in question upon their release from the industrial school and enter a proper adjudication pursuant to §39.10, F. S.; or, since each of the juveniles in question is over the age of 14 years, an order may be entered waiving jurisdiction and certifying the boys to the court which would have jurisdiction of the child if he were an adult and committed the offenses in question pursuant to the provisions of §39.02(6), F. S., provided the statute of limitations has not run (See §932.05, F. S.). With further reference to the authority of a committing juvenile court over a child committed to an industrial school, your attention is directed to the case of ANE, *et al.*, v. State, 156 So.2d 525 (1963).

Because of the answer to question 1, it is not felt that any discussion is necessary with reference to question 2.

065-116—October 13, 1965

CRIMINAL LAW

WORTHLESS CHECK CASES—PAYMENT OF FEES—OTHER MISDEMEANOR CASES

To: Ernest Ellison, State Auditor, Tallahassee

QUESTIONS:

1. In a worthless check case when the affidavit is signed by someone other than a law enforcement officer and the amount of the check is:

a. Less than $50?

b. $50 or more?

2. In any misdemeanor case:

a. When the warrant was issued and served?

b. When warrant was returned unserved?

c. When no warrant was on file and there is no record of one having been issued and served in the case?

Section 939.16, F. S., provides as follows:

> In all cases justices of the peace and county judges in this state shall require payment in advance or security for costs of process, service of the same, and of examination, unless the party applying for a warrant shall make an affidavit of insolvency and of substantial injury to person or property by him suffered, in which case process shall issue without payment of costs.

However, where a crime is one of a public nature, the provisions of §939.16, F. S., as to the deposit of costs are inapplicable. (See Simmons v. State, 71 So. 278; Osceola County v. State, 155 So. 119.) Furthermore, this office has held in AGO 058-300 that the legislature has apparently classified worthless check passing, regardless of the amount, as a crime of a public nature.

However, §832.05(7), F. S., provides that where prosecutions are initiated in a worthless check case before any committing magistrate (regardless of the amount of the check), "The party applying for the warrant shall be held liable for costs accruing in the event the case is dismissed for want of prosecution. No costs shall be charged to the county in such dismissed cases."

Examining question 1 in view of the above set out provisions of law and interpretations therefrom, it appears that regardless of the amount of the worthless check, the passing of said check is a crime of a public nature and as such no deposit of costs are necessary. However, in the event that the case is dismissed for want of prosecution, the party applying for the warrant shall be liable for the costs and in such event, no costs shall be charged to the county.

Question 1 therefore in its entirety is answered in the negative.

The pertinent parts of §36.20(2), F. S., are as follows:

> . . . fees . . . shall be considered as earned by the county judge upon the entry of final judgment order therein, in the county judge's court, . . .

This office has held that where a complaint is filed and a warrant is written out by the county judge and placed in the hands of the sheriff for service, and the case is later terminated either upon adjudication

of guilt or innocence or by other formal disposition, the county judge is entitled to receive his fee. AGO 049-381.

In Golden v. McCall, 108 So.2d 489 (Dist. Ct. App. 1959) the court stated that:

> It must be concluded that (the legislature) intended to allow compensation in any case disposed of by the entry of an appropriate judgment or order clearing the case from the court's docket and signifying an end to further judicial labor therein.

However, the fees in question above were for services rendered in which appearance bonds had been estreated when the defendant failed to appear for trial and the cases were then dismissed.

Therefore, with respect to question 2, some formal disposition by way of an appropriate judgment or order signifying an end to further judicial labor is a necessary predicate to the payment of a fee, the general rule being that a dismissal entered before an accused is placed on trial or before he is called on to plead or before the jury is impaneled and sworn does not bar a subsequent prosecution for the same offense. (22 C.J.S., Criminal Law, §254, p. 663.) Consequently, the dismissal of a case under the circumstances set out in question 2 does not signify an end to judicial labor therein.

In AGO 057-254 involving the question of whether or not a justice of the peace was entitled to be paid a fee by the county when he dismissed the proceedings, it was said:

> . . . it would appear that the county is not liable for the costs, inasmuch as the committing magistrate has nullified his previous acts by dismissing the case. If there were sufficient basis, originally, for executing a warrant it would seem an unusual procedure to dismiss a case merely because a warrant was not immediately served. Dismissal of the case would allow the statute of limitations to run, whereas issuance of the warrant without dismissal would toll the statute of limitations and the alleged culprit could be arraigned if he were apprehended at a later date. Furthermore, §939.14, F. S., states that a county will not pay the costs when a committing magistrate binds a case over to an appropriate trial court and no indictment is returned or information filed. When the justice of the peace dismisses the case, he precludes all possibility of an indictment or information as a result of that warrant and the same result as that anticipated by §939.14, F. S., is reached.

Consequently, something more than the mere issuance of a warrant appears to be a necessary requirement before a magistrate is entitled to his fee. Therefore, AGO 057-254 and any other opinions that conflict with the conclusions reached herein are amended accordingly.

In view of the above, question 2 (in its entirety) is answered in the negative.

065-117—October 13, 1965

WELFARE

STATE DEPARTMENT OF PUBLIC WELFARE—CONSULTANTS, COMPENSATION AND TRAVEL EXPENSES

To: Department of Public Welfare, Jacksonville

QUESTION:

> **May the department of public welfare, in its day care and other workshops operated by it, obtain the services of members**

of the faculty of a state university or college as consultants and pay their travel expenses and an honorarium for their services from welfare department funds?

In your request for opinion you pose the question, "Can this department continue to pay honorariums, varying from $25.00 to $100.00 depending upon the amount of preparation and the actual amount of work required for a particular workshop along with travel under the provisions of Chapter 65-367, (§282.051, F. S., as amended by said Ch. 65-367), or will each time we need this type of consultation have to be approved by the State Budget Commission?"

Said Ch. 65-367 made material changes in said §282.051, F. S., which is a part of the so-called "legislative spending philosophy" of the state, as declared by the Florida legislature.

Section 282.051(3)(e), F. S., as amended by Ch. 65-367, is as follows:

> No person employed by the state may fill more than a total of one full-time equivalent established position, or receive compensation simultaneously from any appropriation other than appropriations for salaries, or receive compensation simultaneously from more than one state agency, unless approved by the budget commission during each biennium. The provisions of this paragraph shall not apply in those instances covered by the provisions of subsection (6) of this section.

Said §282.051(6), F. S., as amended by Ch. 65-367, is as follows:

> The provisions of subsection (3)(e) of this section shall not apply to an individual filling a position, the salary of which has been specifically fixed, or limited, by law. Unless specifically authorized by law, an individual filling or performing duties of a *position*, the salary of which has been specifically fixed, or limited by law, shall not receive compensation from more than one appropriation, nor in excess of the amount so fixed, or limited, by law, regardless of any additional duties performed by him *in any capacity* or position. (Emphasis supplied.)

Said subsection (6) is a limitation upon §282.051(3)(e), as amended, and said paragraph (e) must be construed and applied in the light of this limitation. The term "position" as used in the above statutes, is defined in §282.021(18), F. S., as "the work, consisting of duties and responsibilities, assigned to be performed by an officer or employee." The terms, "full-time position" and "part-time position" are defined in §282.021(19) and (20), F. S.

The general appropriations act of 1965, §1, Ch. 65-135, in items 922a.-937, makes appropriations from state funds, as well as U. S. welfare funds allocated for matching funds to be matched with state funds appropriated, under item 922b., for salaries of 2434 positions with the welfare department which are payable from both state funds and federal funds. In such cases appropriations are made from both the general revenue fund and trust funds in the state treasury to the credit of "welfare" funds derived from federally appropriated funds. These funds are joint U. S. and state funds. This appears to be true as to salaries, personal services and expenses as well as operating capital outlay. See items 922b., 923-925. This matching of funds appears to also extend to the assistance programs (see items 926-934).

Items 977a.-1078 make appropriations from the general revenue fund to pay salaries, personal services and other expenses in connection with the operation of the Florida agricultural and mechanical univer-

sity, the Florida Atlantic university, the Florida state university, and the university of south Florida, which include appropriations for teaching and other positions in the numbers mentioned in items 977b., 992b., 1005b., 1022b., 1057b. and 1077 of §1, Ch. 65-135. Although the legislature did not in many instances spell out in the said general appropriations act specific salaries, under the Florida budgetary statutes spending agencies prepare and submit budget requests to the state budget commission; however, before the budgets of the Florida universities are submitted to the commission they go first to the board of regents who examine the same, make or require the university to make, such changes in the budgets as the board of regents may deem necessary or proper, and upon approval by the said board of regents the same is filed with the state budget commission for its study and approval or other disposition. Upon approval by the state budget commission the proposed budget then goes to the Florida legislature, after which it is referred to the appropriations committee thereof for its study and recommendations. This committee examines the budgets filed by the state budget committee with the legislature, holds hearings on the same and makes their determination, making such changes in the budget as may be necessary to conform to this determination, including their recommended appropriations. Records are preserved as to the amounts determined for each item in the appropriations act. Although specific appropriations are not specifically made for all employees of the state, the budget findings fix limitations upon what a spending agent may pay its employees for which specific amounts are fixed in the appropriations act. In effect some leeway is given the spending agency, when no specific appropriations in a fixed amount are contained in the appropriations act, provided such agency may not pay in excess of the limitation imposed by the legislative budget.

The budget reports used by the legislature, including any changes made therein of record, are public records and may be resorted to in connection with the construction of an appropriation. (State v. Lee, 140 Fla. 380, 191 So. 697; State v. Lee, 144 Fla. 164, 197 So. 681; see also State v. Gray, Fla., 74 So.2d 114, text 132). When the budgetary proceedings are considered, in the light of the statutes relating to the state budget commission, and the proceedings on its reports to the legislature are taken into consideration, we find that the salaries of the personnel of the several universities of the state, if not actually fixed by the legislature, are limited as to amount by the legislative action. A teaching position, as well as most other positions in the university system, are established positions, within the purview of §282.051(3)(e), F. S., as amended, as well as said §282.051(6), F. S., so that such statutory provisions are applicable to such positions with the university system.

In the light of the above and foregoing the above-stated question must be answered in the negative "unless approved by the (state) budget commission during each biennium" as provided in §282.051(3)-(e), F. S., as amended. However, it seems advisable that we discuss the provision in said §282.051(6), F. S., that, "The provisions of subsection (3) (e) of this section shall not apply to an individual filling a position, the salary of which has been *specifically fixed or limited, by law*," also the phrase, ". . . specifically authorized by law" used in the following sentence. (Emphasis supplied.) The term "specifically" has been compared to the terms "explicitly," "particularly" and "definitely," as well as "precisely" (39 Words and Phrases 402). The salaries of most of the employees or personnel of the university system of this state are not "specifically fixed or limited" by an express provision of the statutes, we feel that although they are limited by the legislative

procedures of the last session of the Florida legislature, such limitation may not be said to be a specific limitation; however, where specific salaries are specified in the 1965 general appropriations act (items 977a., 992a., 1005a., 1022a., 1057a., as well as other items) such salaries have been specifically fixed or limited within the purview of the said statutory provisions.

We conclude that the department of public welfare, in its day care and other workshops operated by it, may obtain the services of members of the faculty as consultants and pay their travel expenses and an honorarium for their services from welfare department funds only when "approved by the state budget commission during each biennium." This would not include those officers or employees whose salaries are specifically fixed in the appropriations act or other applicable statute or law.

We are inclined to construe these statutes as relating to appropriations of combined state and federal funds, or only state funds, appropriated, either directly or indirectly, but we doubt its application to federal funds appropriated for particular purposes, where no state or local funds are involved, although reappropriated by the Florida legislature, in which case the reappropriation would appear to be for the purpose of disbursing trust funds of the U. S. through the state treasury so as to conform to the requirements of §4, Art. IX, State Const., and do not constitute state funds in the strict sense. Such funds are treated by §215.32, F. S., as trust funds, and are deposited in the state treasury and paid out therefrom as trust funds, and are held by the state in the nature of trust funds held by the state for the account of the U. S. These provisions for handling trust funds, within the limitations contained in such statutes, appear to have originated as Ch. 22833, 1945.

065-118—October 18, 1965

CONSERVATION

AUTHORITY FOR TAKING OF OYSTERS FROM NATURAL BARS WITHIN MUNICIPALITIES

To: Randolph Hodges, Director, Board of Conservation, Tallahassee

QUESTIONS:

1. Does the Florida board of conservation have jurisdiction over the taking of oysters from natural bars in those salt waters lying within the corporate limits of a municipality?

2. May a municipality regulate the taking of oysters from natural bars in the salt water lying within its corporate limits?

AS TO QUESTION 1:

The states hold and own the lands covered by navigable waters in their respective limits. Such lands are held by the state in trust for the benefit of the people. It is so held primarily for the purpose of maintaining and improving the public rights of navigation and fishery. (3 McQuillin, Municipal Corporations §11.09.)

Each state owns the beds of all the tidewaters within its jurisdiction and the fish in them, unless they have been granted away, subject to the paramount right of congress to regulate commerce and navigation. McCready v. Virginia, 94 U. S. 391 (1876). The manner of taking oysters can also be regulated by the state. Smith v. Maryland, 59 U. S. 71 (1855).

Submerged lands within the corporate limits of a municipal corporation belong to it only where title is vested in it by statute. (64 C.J.S. Municipal Corporations §1816.)

Fish and game laws are within the police power of municipalities although generally they are state or federal and not municipal affairs. (6 McQuillin, Municipal Corporations §24.17.)

In Ex Parte Powell, 70 Fla. 363, 70 So. 392 (1915) the Sup. Ct. of Fla., held that the public waters and the fish therein are held by the state for the benefit of the people of the state, subject to such regulations of the use thereof as the lawmaking power may provide, and the right of individuals to fish in the public waters of the state is subject to state regulation for the general welfare.

In White v. State, 93 Fla. 905, 113 So. 94 (1927) the Sup. Ct. of Fla., recognized that fisheries are one of the sources of wealth of a state and that the fishing industry is a proper subject for legislative regulation and protection.

Section 370.10, F. S., provides in part as follows:

> (1) OWNERSHIP OF FISH, SPONGES, ETC.—All fish, shell fish, sponges, *oysters*, clams and crustacea found within the rivers, creeks, canals, lakes, bayous, lagoons, bays, sounds, inlets and other bodies of water within the jurisdiction of the state, and within the gulf of Mexico and the Atlantic ocean, within the jurisdiction of the state, . . . are the property of the state and may be taken and used by its citizens and persons not citizens, subject to the reservations and restrictions imposed by these statutes . . . (Emphasis supplied.)

Section 370.03 (1), F. S., states:

> All beds and bottoms of navigable rivers, bayous, lagoons, lakes, bays, sounds, inlets, oceans, gulfs and other bodies of water within the jurisdiction of Florida shall be the property of the state except such as may be held under some grant or alienation heretofore made.
>
> * * * * *
>
> Persons who have received, or may hereafter receive permits to do business in this state, with their factories, shucking plants and shipping depots located in this state, may enjoy the right of fishing for oysters and clams from the natural reefs and bedding oysters and clams on leased bedding grounds, and shall have the right to employ such boats, vessels, or labor and assistants as they may need . . .

Section 370.03 (2), F. S., provides in part as follows:

> The state board of conservation has exclusive power and control over all water bottoms, not held under some grant or alienation heretofore made, . . . and may lease the same to any person irrespective of residence or citizenship, upon such terms, conditions and restrictions as said board may elect to impose, without limitation as to area to any one person, for the purpose of granting exclusive right to plant oysters or clams thereon and for the purpose of fishing, taking, catching, bedding and raising oysters, clams and other shell fish . . .

Section 165.09, F. S., grants to cities and towns organized under the general law, jurisdiction over the waters of all rivers, creeks, harbors or bays contained within their corporate limits. However, the Sup. Ct. of Fla., in Ex Parte Guthrie, 147 Fla. 66, 2 So.2d 121 (1941), held that under the city charter of Sarasota, granting it powers over and title to tidewater, other lands, rivers, bay bottoms, waters, waterways and water bottoms, for municipal purposes only, the city did not have

power to regulate fishing within its boundaries. In Ruge v. Apalachicola Oyster Canning and Fish Co., 25 Fla. 656, 6 So. 489 (1889), the Sup. Ct. of Fla., held that a special act which extended the boundaries of a municipal corporation adjacent to the navigable waters does not grant the property covered by the waters to the municipality but is merely for the purpose of civil and criminal jurisdiction.

In Nash v. Vaughn, 133 Fla. 499, 182 So. 827 (1938), the Sup. Ct. of Fla., stated:

> It is our conclusion that the legislature, by enacting numerous special and general laws dealing with the conservation of fish and the regulation and restriction of salt water fishing in the public waters within the territorial jurisdiction of the State, clearly indicated that it did not intend that the charter act of the City of St. Petersburg, and similar charters of other municipalities, granting ordinary police powers in general terms, should operate as a delegation to the cities of the power to regulate fishing, in that portion of bays, inlets, etc., that are within the corporate limits of a municipality. The City of St. Petersburg (nor its citizens) have no such proprietary interest in the fish swimming in Boca Ciega Bay, Tampa Bay or the Gulf of Mexico within the corporate limits of the town as would authorize the City to restrict by ordinance the catching of such fish in the absence of authority delegated to it by the legislature.

The court stated further that:

> . . . we must hold that until the legislature delegates to a municipality the power to regulate and protect fishing within its corporate limits, we cannot hold that the municipality has the power to exercise that authority. As Mr. Justice Cockrell aptly said in *Ex parte* Perry, 71 Fla. 250, 71 So. 174, 176; 'Courts are established to apply the law, not to make it.'

Thus it appears from the statutory provisions and authorities set forth above that the Florida board of conservation is vested with the authority to regulate the taking of oysters from natural bars in salt water within the corporate limits of a municipality, subject to any grant or alienation, and to any special or local laws which may have been passed concerning such authority.

AS TO QUESTION 2:

The above comments would also be applicable in answer to question 2. The Sup. Ct. of Fla. in Price v. City of St. Petersburg, 158 Fla. 705, 29 So.2d 753 (1947), recognized that the legislature could by special act regulate the method of taking fish in designated salt water bodies within a municipality.

Therefore, in the absence of specific statutory authority it appears that a municipality would be prohibited from regulating the taking of oysters from natural bars in the salt waters lying within its corporate limits.

065-119—October 25, 1965

STATE BOARD OF CONSERVATION

REGULATION OF COASTAL CONSTRUCTION

To: Randolph Hodges, Director, Board of Conservation, Tallahassee

QUESTIONS:

1. Does the Florida board of conservation have any statutory authority to regulate construction above the mean high

waterline on privately owned property, if such construction would have a material physical effect on existing coastal conditions or have an adverse effect on public interests?

2. Would a board of county commissioners have the authority to establish setback lines on the foreshore in incorporated areas under the provisions of part II, Ch. 161, F. S. (1965)?

AS TO QUESTION 1:

A landowner's riparian rights are subject to lawful regulation by the sovereign state in the interest of the public and subject to the authority of congress as to commerce and navigation. White v. Hughes, 139 Fla. 54, 190 So. 446 (1939). As stated in 34 Fla. Jur., Water and Watercourses, §164, at p. 296:

> Apart from structures for access purposes, a riparian owner is permitted in Florida to erect, on the bed or shore of navigable waters adjacent to his holding, structures, including bathhouses, to facilitate his business and pleasure, but the privilege is subject to the superior rights of the public as to navigation and commerce, and the concurrent rights of the public as to fishing, bathing, and the like. This privilege is not considered a right appurtenant to the upland, and such structures are none the less purprestures in law, or nuisances if they amount to a damage to a port or to navigation.

Encroachments on the rights of others in front of riparian holdings may be remedied by appropriate procedure at the instance of proper parties, and the state may bring suit to compel demolition of an unauthorized structure erected below the mean high watermark in a proper case. See Williams v. Guthrie, 102 Fla. 1047, 137 So. 682 (1931).

Section 161.041, F. S., 1965 (Ch. 65-408) requires the Florida board of conservation to issue permits to persons, firms, corporations, etc., desiring to make any coastal construction or undertake any physical activity "upon the sovereignty lands of the State of Florida, below the mean high water line of any tidal water of the state." Section 161.061, F. S., 1965, provides that said board may require the removal of any coastal construction, or any structure "upon the sovereignty lands of the State of Florida, below the mean high waterline of any tidal water of the state" which serves no public purpose, which is dangerous to human life, health, or welfare, or which becomes unnecessary or undesirable, as determined by the board. These statutory regulations apply to sovereignty lands belonging to the state of Florida, below the mean high waterline of any tidal water of the state, and do not appear to include privately owned property located above the mean high waterline of any tidal water of the state.

In answer to question 1, there appears to be no specific statutory authority which would allow the Florida board of conservation to regulate coastal construction above the mean high waterline on privately owned property, even though such construction would have a material physical effect on existing coastal conditions or have an adverse effect on public interests.

AS TO QUESTION 2:

There appear to be no specific provisions in part II, Ch. 161, F. S., 1965 (Ch. 65-408) allowing a board of county commissioners to create setback lines on the foreshore in incorporated areas. Section 161.35, F. S., 1965, provides in part that the board of county commissioners may regulate and supervise physical work or activities along the county shoreline with the consent of the board of conservation and any municipality or other political authority involved.

There may be zoning regulations which municipalities are authorized to make pursuant to Ch. 176, F. S., or other special or local laws which might have some bearing as to the type of construction which may be placed upon the foreshore in incorporated areas.

This would appear to answer question 2.

065-120—October 26, 1965

REGULATION OF PROFESSIONS AND VOCATIONS

REAL ESTATE BROKER—SALESMEN—LICENSING

To: Mrs. E. B. Yeager, Tax Collector, Punta Gorda

QUESTION:

Would a person operating as a "real estate broker-salesman" operating under a registered broker be required to have a real estate broker's license under §205.52, F. S.?

Your question refers to the issuance of a real estate broker's license pursuant to §205.52, F. S. This section is a revenue producing law and requires certain license taxes for the privilege of engaging in certain occupations, professions or trades in the state. The real estate broker's license to which you referred is required of every person who operates as a real estate broker and is provided for in Ch. 475, F. S. The provisions of §205.52, F. S., are separate and distinct from the requirements of Ch. 475, F. S., and this opinion will be directed to the licenses provided for in the said §205.52, F. S.

For the purpose of this opinion, I will assume that you have encountered a situation where a person holds a real estate broker's license but is engaged as a real estate salesman under the direct supervision of a person licensed as a real estate broker. Section 205.52, F. S., specifically includes real estate brokers, but no license is required of their salesmen due to the following language:

> . . . This section shall include real estate brokers but no license shall be required of *their* salesmen. (Emphasis supplied.)

It would appear that §205.52, F. S., as to real estate broker's occupational licenses, is limited to those persons in fact engaged in the real estate business in the capacity of broker as distinguished from one licensed as a real estate broker who, in fact, is engaged in the real estate business under the supervision of another broker in a real estate salesman's capacity. If at any time the employed broker changes his status and engages in the activities recognized by Ch. 475, F. S., and the rules and regulations of the real estate commission as those peculiar to a real estate broker, at that time an occupational license issued pursuant to §205.52, F. S., would be in order.

Therefore, it must be concluded that if a person is performing the duties of a real estate salesman as such duties are defined in §475.01, F. S., and the said salesman is in the employ of a registered real estate broker at the time he is performing these duties, the license tax provided for in §205.52, F. S., would not be applicable to such a person due to the specific exemption which is provided for in the said §205.52, F. S.

065-122—October 29, 1965

PUBLIC DEFENDER

SATISFACTION OF LIEN CREATED PURSUANT TO §27.56, F. S.

To: Joseph G. Spicola, Jr., Public Defender, Tampa

QUESTIONS:

1. May a public defender satisfy a lien created pursuant to §27.56, F. S., where an individual represented by said public defender desires to satisfy said lien and is ready, willing and able to pay the reasonable value therefor as set by the court?

a. In what manner should such lien be satisfied?

2. Upon receipt of money collected pursuant to §27.56, F. S., for satisfaction of said lien, to whom should such money be paid?

a. To whom should a check be made payable?

AS TO QUESTION 1:

Section 27.56, F. S., provides as follows:

> There is hereby created a lien, enforceable as hereinafter provided, upon all the property, both real and personal, of any person who is receiving or has received any assistance from any public defender of the state. Such assistance shall constitute a claim against the applicant and his estate, enforceable according to law in an amount to be determined by the court in which such assistance was rendered. Immediately after such assistance is rendered and upon determination of the value thereof by the court, a statement of claim showing the name and residence of the recipient shall be filed for record in the office of the clerk of the circuit court in the county where the recipient resides and in each county in which such recipient then owns or later acquires any property. Said liens shall be enforced on behalf of the state by the several public defenders, and shall be utilized to reimburse the state to defray the costs of the public defender system. The lien herein created shall be a continuing obligation, irrespective of any statute of limitations.

This statutory provision allows the several public defenders to enforce liens created pursuant to said §27.56, F. S., on behalf of the state. Although there appears to be no specific statutory authority which would allow a public defender to satisfy said lien, it would seem that a person or individual who has authority to execute and enforce a claim of lien on behalf of the state would also have authority to execute a satisfaction thereof.

"A collection agent, besides simply collecting, may receipt for payments, make proper application thereof, and perform such acts as are ordinarily incident to collect, . . ." (2 C.J.S. Agency, §107, p. 1286.) "In the absence of statutory provisions, the person shown by the record to be entitled to receive payment is in general the proper party to enter satisfaction of the mortgage on the record, . . ." (59 C.J.S. Mortgages, §470(c), p. 737.) Under the above statute the public defender is the person charged with the enforcement of the state's lien; and under the above authorities he appears to have authority to receipt for such payments and issue satisfactions in behalf of the state, including marginal

satisfactions as is provided for in §701.04, F. S. Upon payment of the lien the public defender should issue to the person paying the same a receipt therefor, signed the state of Florida by him as public defender and either make satisfaction of the lien either by satisfaction in the usual form delivered to the person making payment or by marginal satisfaction in accordance with said §701.04, F. S.

The public defender may execute in writing an instrument, properly acknowledged so as to permit its record in the proper office, acknowledging satisfaction of said lien and having same acknowledged or proven and duly entered on record in the office of the clerk of the circuit court in the county or counties where a "Statement of Claim" has also been entered. The following form for this instrument is suggested:

SATISFACTION OF STATEMENT OF CLAIM

KNOW ALL MEN BY THESE PRESENTS, That _____, the Public Defender and holder of a certain Statement of Claim filed by _____, the Public Defender, against _____, bearing date the _____ day of _____, 19 ____, and recorded in official Records Book _____, at page _____, in the Office of the Clerk of the Circuit Court of _____ County, State of Florida, claiming a lien in the sum of $_____, upon the following described real (or personal) property, lying and being in _____ County, Florida, to wit:

(legal description)

has received full payment of said Statement of Claim, and does hereby acknowledge satisfaction of said Statement of Claim, and hereby directs the Clerk of said Circuit Court to cancel the same of record.

WITNESS his hand and seal this _____ day of _____, 19____.

Public Defender (or Assistant)

This appears to answer question 1.

AS TO QUESTION 2:

The moneys collected pursuant to §27.56, F. S., become the property of the state, and should be remitted to the state treasurer, who should deposit said funds in the general revenue fund of the state. The general revenue fund is used to pay the salaries of public defenders, their assistants, stenographers, and other expenses as provided in the general appropriations act, items 762-845 (Ch. 65-135) and §27.54, F. S., and therefore, any funds collected pursuant to §27.56, F. S., should be returned to this fund in order to help defray the expenses of the public defender program. Checks should be made payable to the state of Florida.

This appears to answer question 2.

065-123—November 4, 1965

BANKS AND BANKING

INVESTMENT OF BANK AND TRUST COMPANY FUNDS IN BONDS OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Are bonds issued by the international bank for reconstruction and development eligible investments for banks and trust companies of Florida under §659.20, F. S.?

The international bank for reconstruction and development was established by articles of agreement made and entered into by and between some 45 nations of the world, but now totaling some 102 nations, including the United States, United Kingdom, Norway, Mexico, India, Greece, France, Denmark, Canada, Brazil, Australia and other nations, which articles of agreement became effective on Dec. 27, 1945. The said bank operates for and carries on the purposes mentioned in Art. I, of the said articles of agreement. Section 8 of Art. IV, of the said articles of agreement, sets out certain miscellaneous operations of the said international bank for reconstruction and development.

The said bank is governed by a board of governors, an executive director, a president and other officers, in which are vested the powers and authority of the said bank. The articles of agreement, abovementioned, are, in form and substance, similar to a corporate charter. The said bank is given by Art. VII, of the said articles of agreement, "full juridical personalty, and, in particular, the capacity to contract, to acquire and dispose of immovable and movable property, (and) to institute legal proceedings." (§2).

The said international bank for reconstruction and development is clearly an international agency and instrumentality of the member nations and subscribers of the said articles of agreement and member nations. It seems to be in the nature of, if not actually, an international corporation of the said subscribers and member nations. It is not a corporation of the U. S., or of any of the other member nations, but of the said subscribers and member nations. The said international bank for reconstruction and development and any bonds issued by it, differs little, if any, from a common law corporation, or a corporation organized and existing under the corporate laws of any of the several states of the U. S., or of other states and nations. It appears from the information furnished us that the member nations of the said international bank for reconstruction have underwritten its obligations in proportion to the interests of such nations in and to the said bank.

Section 659.20, F. S., as amended in 1965, seems to authorize as well as to limit the investments in which the funds of bank and trust companies, incorporated under the laws of Florida may legally be invested. Subsection (1) of said section, as amended, seems to regulate the investment of such funds in stock of incorporated companies, and not investments in bonds of corporations, and is not here applicable. Subsection (2) of said section, as amended, is limited to investments in obligations of the U. S., obligations under the federal farm loan act, obligations of the banks of cooperatives or any of them, obligations insured by or under named federal agencies, and general obligations of states, counties and political subdivisions. Obligations of the international bank for reconstruction and development are not within the purview of any of these. Section 659.20(3), as amended, provides that:

> A bank or trust company may invest in other *marketable* bonds or securities with *investment characteristics* as defined by the commissioner as follows: (Emphasis supplied.)

Paragraph (a) of said subsection does not appear to be applicable here. Paragraph (b) of said subsection provides that a bank or trust company may invest up to 10% of its unimpaired capital and surplus in (such marketable bonds or securities with investment characteristics) corporate obligations of any one obligor or maker. The other subparagraphs of said §659.20 do not appear to have any application here.

We are of the opinion that bonds of the international bank for reconstruction and development are within the purview of said §659.20-(3)(b), F. S.

065-124—November 4, 1965

BANKS AND BANKING

BANK HOLIDAYS—§659.271, F. S., AS AMENDED BY CH. 65-36, LAWS OF FLORIDA

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. May a bank that normally closes on Saturday remain closed on Monday, Dec. 27, 1965 and Jan. 3, 1966?

2. May a bank that is normally open on Saturday remain closed on Monday, Dec. 27, 1965 and Jan. 3, 1966?

Section 659.271(3), F. S., as amended by §1, Ch. 65-36, provides:

> Whenever any legal holiday shall fall upon a Wednesday, Thursday, or Saturday the next following day which, except for the provisions of this subsection, would otherwise be a business day shall, with respect to any bank or trust company which shall be closed on any one or more Wednesdays, Thursdays, or Saturdays, in accordance with the provisions of subsection (1), be deemed a legal holiday for all and any of the purposes and business mentioned in subsection (1); provided, however, that any such bank or trust company may elect to treat any such next following business day as a business day and open its doors for the transaction or conduct of a limited banking business by the operation of one or more, but less than all, its departments, sections or functions, and at the election of such bank or trust company, the limited business transacted or conducted on such day shall be deemed for all purposes as transacted or conducted on the next following business day.

Section 659.271(1), F. S., provides that:

> Any bank or trust company lawfully doing business in the state may be closed on any one or more Wednesdays, Thursdays, or Saturdays upon the adoption of a resolution to such effect . . . Any one or more of such Wednesdays, Thursdays or Saturdays shall, with respect to any such bank or trust company . . . constitute a holiday for all purposes whatsoever . . .

Some of the banks which are the subject matter of this opinion have by proper resolution declared Saturday of each week a closing date or holiday, while other banks and trust companies have elected not to close on Saturdays. Christmas day, Dec. 25, 1965, and new year's day, Jan. 1, 1966, each fall on a Saturday and are legal holidays under §§683.01 and 683.02, F. S. Said §683.01(2), thereof, provides:

> Whenever any legal holiday shall fall upon a Sunday, the Monday next following shall be deemed a public holiday for all and any purposes aforesaid.

Monday following a holiday on Saturday would not appear to be a holiday under said §683.01, F. S., as would have been the case had the holiday fallen on Sunday.

Under §659.271, F. S., as amended by Ch. 65-36, banks and trust companies which have by resolution, as provided for in §659.271, F. S., as amended, provided for their closing on Saturdays, may close on Monday following a holiday falling on a Saturday; however, this statutory permission for closing on the following Monday when a holiday falls on a Saturday, appears to be applicable only to those banks and trust com-

panies which come within the purview of said §659.271, as amended, and not to banks and trust companies generally.

Question 1 is answered in the affirmative, and question 2 in the negative.

065-125—November 4, 1965

TAXATION

ASSESSMENTS AGAINST TANGIBLE PERSONAL PROPERTY—ENFORCEMENT

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

> **1. Is the tax collector burdened with the obligation under the law to incur the expense of attempting to hold the former owner of the realty, against whom the tangible tax has been assessed, liable even though the realty has been foreclosed against or deeded back to the first mortgage holder?**
>
> **2. Assuming that the tangibles have been removed and cannot now be located, is he further burdened with the obligation or duty to endeavor to obtain a judgment against the delinquent taxpayer and levy on any assets such individual or corporation may own?**

We gather from your file handed us with your request for opinion that the tangible personal property taxes contemplated by the above-stated questions are based on assessments imposed by the county assessor of taxes, for the tax year of 1964 and maybe prior years, upon the 1964 and prior tax rolls for Broward county. Presently, presuming that such tax assessments were properly and validly made, and that the taxes imposed are due or will in due time become due and payable, we will concern ourselves with the tax obligation and the lien provided by law to secure its payment and enforcement. In St. Petersburg v. Fiore, 160 Fla. 106, 33 So.2d 852, text 853 and 854, it is stated that: "A tax is not a lien even upon the property against which the tax is assessed unless made so by statute." (See also State v. Culbreath, 140 Fla. 634, 192 So. 814, text 818; Prince Hall Masonic Bldg. Ass'n. v. City of Jacksonville, 149 Fla. 109, 6 So.2d 250, text 251). Such liens are creatures of statute.

Section 192.21, F. S., provides, insofar as here material, that:

> All taxes imposed pursuant to the constitution and the laws of this state shall be a first lien *superior to all other liens* on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment . . . (Emphasis supplied.)

Nothing in this section subordinates the lien imposed by it to any recorded or other liens. Section 200.02, F. S., provides that:

> All tangible personal property taxes shall be a lien on *all of the personal property* of the taxpayer in the county in which they are assessed from January 1 for which year the property is liable to assessment. The lien of tangible personal property taxes shall be superior to all other liens, except liens for other taxes, state, county and municipal. (Emphasis supplied.)

Under §200.27, F. S.:

> Taxes on tangible personal property shall be deemed de-

linquent on April 1 of the year following that for which the assessment was made.

We presume that the advertisement mentioned in said §200.27, F. S., was duly and properly made and given. The method of enforcement of such tax liens is set out in the latter part of said §200.27, F. S. Under §200.30, F. S.:

> All taxes assessed upon tangible personal property, from the date such taxes become due, shall have all the force and effect of a judgment and execution at law against the owner of such property, except that the same shall not constitute a lien on the real property of such owner.

Under §200.31, F. S., tax warrants may be served and operate as writs of garnishment upon persons, firms and corporations holding personal property of the taxpayer or those who are indebted to him. Such tax warrants may be served as writs of garnishments by the tax collector or his deputy.

Our examination of the papers and documents attached to your request for opinion reveals letters and other information indicating that tangible personal property taxes were, or may have been, assessed against owners and lessors of real property used for housing purposes when such owner or lessor owned no tangible personal property in the building where the personal property was supposed to be located. We find no reasonable explanation why such properties, owned by lessees and others, were assessed against the owner of the realty instead of against the owners of such properties. Under §200.02, F. S.: "All tangible personal property taxes shall be a lien on all of the personal property of the taxpayer in the county in which they are made." Where one person owns an apartment building or other housing unit and rents to another space therein unfurnished, with the tenant using his own furniture, an assessment against such furniture in the name of the owner of the apartment building or other housing unit would be unauthorized and not binding on the lessor.

We find in the "Florida Tax Assessors' Manual," which appears to have been prepared by the comptroller, and approved and adopted by the budget commission, and bears the date "1959," pp. 107 and 108 thereof, a "Chart for Use in Assessing Household Goods and Personal Effects," which appears to indicate the taxable value of household goods and personal effects in a dwelling, apartment or other dwelling unit of a stated value. Doubtless these figures were intended to indicate averages when numerous dwellings, apartments or other dwelling units are surveyed. As real and tangible personal property taxes are imposed upon the value of individual parcels or items of property, and not on averages, we doubt the validity of an assessment based upon tables such as that above-mentioned. Such tables, if used at all, should be used only when the assessor is refused access to the living or other housing unit and is not permitted to survey the taxable property, and in such cases the reason for using the table should be entered on the tax roll in connection with the assessment.

Neither is it legal to impose taxes on the lessor or renter where the household goods and personal effects belong to the lessee or person renting the facilities. Such assessments must be against the owner of the properties, whether the lessor or the lessee. The household goods and furniture belonging to the lessee may not be assessed against the lessor, or vice versa. There is indication in the file before us that this may have happened, at least in some cases. It is provided in §200.02, F. S., that:

> No assessment shall be held invalid unless suit be insti-

> tuted within sixty days from the time an assessment shall become final . . .

This period of time appears to run from the time the tax rolls are delivered to the tax collector (Rudisill v. City of Tampa, 151 Fla. 284, 9 So.2d 380; Overstreet v. Frederick B. Cooper Co., Fla. App., 114 So.2d 333; Chatlos v. Overstreet, Fla., 124 So.2d 1, text 2 and 3). In Hansen v. Port Everglades Steel Corp., Fla. App., 155 So.2d 387, text 391, the Dist. Ct. of App., 2nd Dist. of Fla., said, concerning the 60-day limitation in §192.21, F. S., that it was not "applicable to suits in which assessments are charged to be *unauthorized and void*, which may be enjoined or relieved against at any time." (Emphasis supplied.) See also Overstreet v. Ty-Tan, Inc., Fla., 48 So.2d 158, text 160, to the same effect. This rule relates to void assessments as distinguished from voidable assessments.

We have, hereinabove, discussed the question of possible tax invalidity by reason of the assessment of property against a landlord when such property was that of the tenant, as indicated from correspondence and copies of correspondence in your file handed us with the request for opinion. We doubt the validity of such an assessment insofar as the landlord is concerned. He would not appear to be liable for ad valorem taxes on properties owned by the tenant. Such assessments might be classified as acts of omission or commission within the purview of §200.02, F. S., which provides in part that:

> . . . any such acts of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place, and when so corrected they shall be construed as valid ab initio . . .

This section would seem to permit a correction in the name of the taxpayer if done within the 3-year period allowed for the back assessing of omitted properties, as provided for in §200.16, F. S.

In addition to being a possible lien upon the tangible personal property assessed, under §192.21, F. S., it is provided in §200.02, F. S., of said statutes that:

> All tangible personal property taxes shall be a lien on all of the personal property of the taxpayer in the county in which they are assessed from January 1 for which year the property is liable to assessment.

which liens are by said sections declared to be "superior to all other liens, except liens for other taxes, state, county and municipal." These statutory liens do not appear to encumber the real property of the taxpayer. The procedures for collecting delinquent personal property taxes are set out in §§200.27-200.33, F. S., (See also §§193.46-193.49, F. S.). It does not appear to be necessary for the tax collector to bring suit against the taxpayers in order to enforce the collection of tangible personal property taxes; tax warrants may, under §200.31, F. S., be used as writs of garnishment to reach debts and obligations due by third parties to delinquent taxpayers of tangible personal property.

The above-stated questions are answered as follows:

1. The realty of delinquent tangible personal property taxpayers is not encumbered by tangible personal property taxes, so that the foreclosure or the deeding back of mortgaged real property in no way affects the lien of tangible personal property taxes. However, the tangible personal property of the taxpayer, where the tax is not void, is liable for the payment of the tax, the lien of which tax is subject only to the lien of other taxes, which should be enforced against the tangible property of the taxpayer. It is questionable that the fore-

closure of a mortgage encumbering tangible personal properties of the taxpayer would be binding on the county generally.

2. The lien of taxes, imposed under Ch. 200, F. S., encumbers not only the tangibles taxed, but also other tangible property of the taxpayer in the county which may be reached by a tax warrant. We note that mention is made of obtaining a judgment against the taxpayer upon which an execution may be issued. Such a judgment, if it becomes a lien on real property, would not revert back to the date of assessment but merely and only from its record in the judgment lien record book. As a usual thing we doubt that an execution would be effective if a tax warrant was not.

065-126—November 4, 1965

WITNESSES

FEES AND MILEAGE FOR MUNICIPAL POLICE OFFICERS APPEARING BEFORE GRAND JURIES AND PROSECUTING ATTORNEYS

To: Clair A. Davis, State Attorney, Clearwater

QUESTION:

To what compensation, if any, are municipal police officers within the purview of §§90.14 and 90.141, F. S., entitled, who appear as witnesses before grand juries and prosecuting officers authorized to file informations or formal criminal trial proceedings in circuit court?

Under §90.14, F. S., witnesses in criminal cases in the circuit courts receive "for each day's actual attendance three dollars and also five cents per mile for actual distance traveled to and from the courts; . . ." Section 90.141, F. S., provides that:

> Any law enforcement officer of any *municipality*, county or the state who shall appear as an official witness to testify at any hearing or law action in any court of this state as a direct result of his employment as a law enforcement officer shall be entitled to per diem and traveling expenses at the same rate provided for state employees under §112.061. (Emphasis supplied.)

Said §90.141, F. S., appears to place municipal officers within the same classification as are county and state officers for the purposes of said §90.141, F. S. Generally, AGO 64-69 of May 28, 1964, relating to the compensation of public officers appearing as witnesses before grand juries and prosecuting officers authorized to file informations, should also be applied to municipal police officers, as well as to the public officers specifically mentioned in §902.19(4), F. S., applying the same rules to such municipal officers as are applied to the public officers specifically mentioned in the said subsection.

065-127—November 4, 1965

STATE AND COUNTY OFFICERS AND EMPLOYEES

MILITARY LEAVE—MINIMUM FOUNDATION PROGRAM FUNDS

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May the leave of absence not to exceed 17 days in any 1 annual period to which all officers and employees of this state

are entitled "without loss of pay, time or efficiency rating" under provisions of §§115.07 and 250.48, F. S., be included as part of the "minimum time which may be recognized . . . as a year of service" for the allocation of minimum foundation program funds, as defined in §228.041(24), F. S., 1965?

2. If the 17 days may not be counted, under present state board of education regulations, could the state board of education adopt a regulation which would allow such military leave to be counted in determining a year of service?

Section 228.041(24), F. S., as amended 1965, in defining a year of service for the purpose of administering the allocation of funds under the minimum foundation program, provides, *inter alia:*

> The minimum time which may be recognized . . . as a year of service by a school employee shall be full-time *actual service* . . . (which) shall also include sick leave for which compensation was received but *excluding all other types of leave and holidays* . . . provided . . . that the county board of public instruction shall have authority to establish a different minimum for local county school purposes. (Emphasis supplied.)
>
> Military leave *shall not be counted as years of service toward a continuing contract or for allocation of minimum foundation funds.* (Emphasis supplied.) (See last sentence of §231.39(2), F. S.)

Section 115.07, F. S., pertaining to leaves of absence of officers and employees of this state entitles such officers and employees who are members of the U. S. military or naval reserve or national guard "as a matter of legal right," to military "leaves of absence (which) shall not exceed seventeen days in any one annual period . . . without loss of pay, time or efficiency rating . . ."

Section 250.48, F. S., similarly provides that officers and employees of this state who are members of the Florida national guard shall be entitled to leave of absence while on active state military duty, "from their respective duties, without loss of pay, time or efficiency rating," also for a period not to exceed 17 days at any one time.

I am of the opinion that neither the clause "without loss of pay, time or efficiency rating" in §§115.07 and 250.48, F. S., nor the proviso in §228.041, F. S., that "the county board of public instruction shall have authority to establish a different minimum for local county school purposes," can prevail against the clear, unequivocal and specifically applicable pronouncement that "military leave shall not be counted as years of service toward a continuing contract or for allocation of minimum foundation funds" in §231.39(2), F. S.

From the foregoing it follows that the state board of education could not adopt a valid regulation which would allow any military leave to be counted in determining a "year of service."

Questions 1 and 2 must be answered in the negative.

065-128—November 10, 1965

EDUCATION

TITLE II, PUBLIC LAW 88-452—PROJECT HEADSTART

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

If the Hillsborough county board of public instruction operates a kindergarten program with funding from project

headstart, will such program be subject to the inspecting and licensing regulations of the Hillsborough county health department?

I have carefully examined title II of Pub. Law 88-452, which is the federal statutory authority under which the so-called "Project Headstart" is authorized and regulated. I find nothing in that law that would preempt the inherent authority of this state, through its police power, to promote and protect the public health.

In AGO 056-174, dated June 14, 1956, one of my predecessors in office concluded: "In the light of (§§154.01, 154.04 and 154.05 and cited authorities) . . . county public health units are state agencies operated by the state board of health in cooperation with the boards of county commissioners."

In the light of the foregoing, I am of the opinion that a county health unit, as an integral subdivision of a state agency duly established by the legislature pursuant to the State Const. (§3, Art. XV), is vested with the authority to subject a county board of public instruction to such regulations as those mentioned in your question.

Your attention is invited, however, to AGO 065-81, Aug. 2, 1965, to the effect that a municipality cannot require public school officials to meet the standards of a municipal fire prevention code as to public school buildings, either existing or to be constructed, when such standards are more stringent than those in state statutes prescribing minimum standards for the construction and maintenance of school buildings. That opinion is distinguishable from the present one in that the former involved an unwarranted attempt to subject an agency of the state of Florida to a municipal ordinance. That question is not involved in the instant case and this opinion is, therefore, not to be considered as a repudiation of or departure from any part of the previous opinion.

On the basis of the foregoing, your question is answered in the affirmative.

065-129—November 10, 1965

RETIREMENT

SERVICE IN THE FLORIDA STATE GUARD

To: Major General Henry W. McMillan, State Arsenal, St. Augustine

QUESTION:

Is service in the Florida state guard, formerly the Florida defense force, during world war II (Aug. 27, 1940 to Dec. 31, 1946), creditable as service in the organized militia of the state of Florida under the provisions of §250.22, F. S.?

It is provided in §250.22, F. S., that:

> Any person who shall have reached the age of sixty-four years and shall have completed not less than thirty years of service as an officer or enlisted man *in the organized militia* of Florida (exclusive of time served on the inactive or retired lists) on, before or subsequent to the passage of this section shall be eligible upon his own application, whether on the active or retired list of said organized militia, to be retired under the provisions of this section . . . (Emphasis supplied.)

There is no indication in the request for opinion that the member of the Florida state guard in question ever was inducted into the federal military forces from the Florida state guard during a period of

war or upon order of the president of the U. S., so as to be within the proviso in §250.22(1), F. S., relating to service in the federal military forces. The question before us appears to be whether the member of the Florida state guard, formerly the Florida defense force (§1, Ch. 21783, 1943), was "an officer or enlisted man in the organized militia of Florida" by reason of his service in the said Florida defense force or state guard between June 5, 1941 and Sept. 14, 1946.

Your question posed in your letter of Oct. 26, 1965, appears to concern one W. D. E., No. 24,620,019, currently a member of company D, 146th signal battalion, who appears to have served with the Florida defense force or state guard, from June 5, 1941 to Sept. 14, 1946, which appears to have been organized and established by Ch. 20214, 1941, which became a law, and became effective on April 22, 1941, a date prior to June 5, 1941 above-mentioned. The purpose of said Ch. 20214, 1941, appears from §1 thereof, as well as present §251.01, F. S., each of which provides that:

> Whenever any part of the national guard of this state is in active federal service, the governor is hereby authorized to organize and maintain, within the state during such period, under such regulations as the secretary of war of the United States may prescribe for discipline in training, such military forces as the governor may deem necessary to assist the civil authorities in maintaining law and order . . .

We come now to the question of whether the "Florida State Guard" organized and existing under Ch. 251, F. S., is a part of "the organized militia of Florida," so as to be within the meaning and purview of §250.22(1), F. S.

Chapter 8502, 1921, reorganized the military forces of the state, and divided the same into 4 classes, that is, the national guard (active, reserve and retired), the naval militia, the marine corps and the unorganized militia. Chapter 5202, 1903, appears to have divided the militia of Florida into the organized militia and the unorganized militia. Section 4, Ch. 8502, 1921, was brought into the Florida Statutes, 1941, as §250.04, F. S., thereof, continuing the classifications made in said section and chapter. Chapter 250, F. S., was amended and extensively revised by Ch. 25112, 1949, and recodified as Ch. 250, F. S., §250.02 of which, after defining the term "militia" of Florida, divided the same into two classes as follows:

> 1. The organized militia shall be composed of the national guard and such other organized military forces as are now or may be authorized by law.
>
> 2. The unorganized militia shall be composed of all male persons subject to military duty but who are not members of units of the organized militia.

This classification appears in §250.02 of the current Florida Statutes.

Under §2, Art. XIV, State Const., "the Legislature may provide by law for organizing and disciplining the militia of the state . . ." All able-bodied male inhabitants of the state between the ages of 18 and 45 years constitute the militia of the state. Chapter 251, F. S., which originated as Ch. 20214, 1941, appears to have been duly authorized by §2, Art. XIV, State Const., so that persons serving in Florida defense force (now the Florida state guard) are subject to classification as officers or enlisted men in the organized militia of Florida, and are within the purview of §250.22, F. S., if their said military service otherwise conforms to the requirements of said section. We mention specifically the requirement in said §250.22, F. S., that "in computing such service performed after *July 1, 1955*, only federally recognized

service shall be included." (Emphasis supplied.) Under this requirement service with the Florida defense force or the state guard after July 1, 1955, may not be recognized for the purposes of said §250.22, F. S., after said July 1, 1955, unless such service was federally recognized.

The question posed above is answered in the affirmative as to the service between Aug. 27, 1940 and Dec. 31, 1946. If the applicant served for the said entire period of time or for such part thereof he actually served in the said Florida defense force and the state guard. The county guards (§§1425-1442, R.G.S.) appear to have been the predecessor of the Florida defense force and state guard.

065-130—November 16, 1965

ELECTIONS

MILLAGE ELECTIONS UNDER §10, ART. XII, STATE CONST.

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May a county board of public instruction which requested that a school district millage of 3.56 mills be voted under §10, Art. XII, State Const., but a lower millage was voted, fix a district school millage in excess of the voted millage but less than the 3.56 mills requested?

2. If the general level of the assessed value of taxable property in a county be sufficient to bring it within the purview of §§193.03 and 193.031, F. S., as amended and added by Ch. 65-258, will the said sections be applicable to the millage voted at the general election in 1965, under §10, Art. XII, State Const.?

3. Under the circumstances mentioned in question 2, will said §§193.03 and 193.031, F. S., be applicable to the millage fixed and determined by the county board under §8, Art. XII, State Const.?

4. How should the votes cast under §10, Art. XII, State Const., be ascertained and determined when no millage actually voted on received a majority of the votes cast at an election held under §10, Art. XII, State Const.?

Question 4 has been added to the ones posed by you because of the numerous calls received by this office concerning the method of determining the "majority of the qualified electors" of a county "voting in favor of such levy," especially, as in the case mentioned by you, some 17 different millages were voted on, no single millage having received a majority of the votes cast.

Section 10, Art. XII, State Const., insofar as here material, provides for an election to fix and determine the millage "whenever a majority of the qualified electors thereof that pay a tax on real or personal property shall vote in favor of such levy; provided, that any tax authorized by this section shall not exceed ten mills on the dollar in any one year on the taxable property of the district."

At an election held under this section of the State Const., on Nov. 2, 1965, a millage less in amount than the 3.56 mills requested by the county school board was voted. The total voters appearing at

the election polls in the county in question appear to have been 52,002; however, the ballots of 33 of these voters were held void by the election officials and were cast out and not counted, leaving 51,969 countable ballots, a majority of which number would appear to be 25,985. However, no millage received more than 20,591 votes. It is evident that a millage was voted, the exact amount of which will be hereinafter determined.

Section 3 of said Ch. 65-258 (§193.032, F. S.), which chapter amended §193.03 and added §193.031, F. S., relating to millage controls, provides that nothing in said chapter "shall require the reduction of millage authorized to be levied pursuant to the provisions of §10, Art. XII, State Const. This provision excludes the millages voted under §10, Art. XII, State Const., from the operation of said §§193.03 and 193.031, F. S. The State Const., by said §10, Art. XII, has fixed a method for the electors themselves to fix school district millages, which has the effect of divesting the legislature of the authority to regulate or change such millages. In this case the legislature made no attempt to include such voted millages in §§193.03 and 193.031, F. S., but expressly excluded such millages from the operation of said §§193.03 and 193.031, F. S. The millage roll back and control provisions are not applicable to millages voted under said §10, Art. XII, State Const.

Questions 1 and 2 are each answered in the negative.

Section 8, Art. XII, State Const., provides that: "Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three mills nor more than ten mills on the dollar on all taxable property in the same." Under this section of the State Const., the county school boards are required to levy a tax annually for school purposes of not less than 3 mills nor more than 10 mills. We find nothing in said Art. XII State Const. that would seem to take away from the Florida legislature its power over school millages so long as such millages do not fall below 3 mills nor exceed 10 mills. We find nothing in either the Florida or the federal constitutions that would seem to be contrary to said §§193.03 and 193.031, F. S., as applied to county school millages, as distinguished from school district millages, so long as such millages do not fall below 3 mills or exceed 10 mills. Said sections may not be applied.

Question 3 is answered in the affirmative.

Seventeen different millages, ranging from 0 mills to 10 mills, received votes at the election, 20,591 of which votes were for a millage of 3.56 mills (the recommended millage); however, as the total votes cast at the election were 51,969 votes (33 of the total of 52,002 electors presenting themselves voted void ballots) of which 25,985 would be required as a majority, so that no particular millage vote received a majority. It is provided in §236.32(6), F. S. that, under such circumstances the "levy for which, together with the votes cast for higher levies, a majority of the votes are cast, shall become the levy for the district for the next ensuing two years." This provision was derived from §1032 of Ch. 19355, 1939, the same being the school code of 1939. We do not find a statute on the subject prior to said Ch. 19355, 1939. So far as we are advised this procedure for counting school district millage votes has not been questioned in the Florida appellate courts. The votes cast for millages in excess of 2 mills total 24,598, a number some 1407 votes short of a majority of the 51,969 votes at the election. In order to obtain a majority of such votes so cast we must go into the 12,607 votes cast for a 2 mill millage to the extent of 1407 votes.

Under the formula provided by said §236.32, F. S., the millage voted at the Nov. 2, 1965 election in Broward county was 2 mills.

The observations contained in the above paragraph answer question 4.

065-131—November 24, 1965

REGULATIONS OF PROFESSIONS AND VOCATIONS

RULES AND REGULATIONS OF COSMETOLOGISTS

To: Dr. Wilson T. Sowder, State Board of Health, Jacksonville

QUESTION:

Do the provisions of §477.23(10), F. S., require the state board of health to approve all rules and regulations adopted by the state board of cosmetology?

Section 477.23(1)-(10), F. S., set forth certain sanitary and health requirements that must be maintained in cosmetology salons and schools, the violations of which are made a misdemeanor. Section 477.23(10), F. S., provides in addition as follows:

> The board may make other rules and regulations *and prescribe other sanitary requirements in addition to the foregoing in aid or furtherance of the provisions of this chapter, subject to the approval of the state board of health.* (Emphasis supplied.)

The provisions of §381.031(1), F. S., set forth the powers and duties of the state board of health which relate primarily to health and sanitation standards: formulating general policies affecting the public health of the state (§381.031(1)(a), F. S.); supervising the adoption and enforcement of laws, rules and regulations relating to sanitation, control of communicable diseases, prevention and control of public health nuisances (§381.031(1)(b), (g), F. S.).

From the foregoing, it would reasonably appear to us that the legislature intended to require approval of only those cosmetology regulations relating to sanitation or health. It seems unlikely that the legislature intended the state board of health to pass upon regulations adopted by the board of cosmetology embracing matters totally unrelated to health and sanitation.

A cardinal principle of statutory construction is that the primary purpose designated in a statute should determine the force and effect of the words used in the statute and no literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or a purpose not designated by the lawmakers. (Smith v. Ryan, 39 So.2d 281.)

In addition to the above-mentioned principle, there is a doctrine known as the "last antecedent." By this doctrine, relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including other words and phrases more remote, 82 C.J.S., Statutes, p. 670. The clause "subject to the approval of the state board of health" as contained in §477.23(10), F. S., appears to qualify and is subject to the phrase immediately preceding it, to wit: "and prescribe other sanitary requirements in addition to the foregoing in aid or furtherance of the provisions of this chapter."

Accordingly, in order to effectuate the legislative intent and purpose of §477.23(10), F. S., it is my opinion that it is the duty of the state board of health to approve only those regulations adopted by the state board of cosmetology which relate to health and sanitation.

065-132—November 24, 1965

LICENSE TAX

HAWKERS AND PEDDLERS—VALIDITY OF LEE COUNTY SPECIAL ACT REQUIRING SUCH TAX ONLY FROM NONRESIDENTS OF COUNTY

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Does the right of a state, as a condition to engaging in the business of a hawker or peddler in Lee county, by and through Ch. 65-1818, to require that all such hawkers and peddlers, who are nonresidents of Lee county, including those coming in from other states, obtain a permit from the tax collector for said Lee county, and pay a fee therefor of $5, while exempting hawkers and peddlers with headquarters in said Lee county, from such requirement.

This question poses constitutional questions so as to determine such question the constitutionality of said Ch. 65-1818 must be considered and determined. It has long been the policy of this office to leave constitutional questions to the courts and not to determine the constitutionality of such an act.

A hawker has been defined as an itinerant trader who, like a peddler, carries his goods with him for sale, attracting attention to himself and his wares by public outcry, placards, labels and signals, or by exposing his goods in a public place; while a peddler has been defined as a small retail dealer who takes merchandise with him, selling the same from place to place and from house to house. In such cases the hawker's or peddler's place of business would seem to move from place to place, following the movements of himself and his goods, wares and merchandise, so that his place of business is a movable one. Such a person would seem to be liable for a state and county license tax under §205.59, F. S. However, it is provided in said Ch. 65-1818 that: "As used in this act 'hawkers' or 'peddlers' is defined as any individual who for himself, a person, firm or corporation solicits sales or subscriptions for goods or services in or about private residences of citizens of Lee county," Florida. This may indicate not only hawking and peddling operations as well as the taking of orders for goods, wares and merchandise to be filled by others whose place of business may be at another location, maybe in another state. If in such other state, interstate commerce may be involved, bringing the transaction within interstate commerce and making effective the rules of interstate commerce as to transactions crossing state lines.

"As a general rule, where the business or occupation is within the jurisdiction of the state, and therefore subject to its regulation and control, any transaction in relation thereto is not concerned with interstate commerce; nor is a tax on such business or occupation obnoxious to the Fourteenth Amendment . . . The state has power to impose a license tax on all trade or business carried on within its borders, whether by its own citizens or those of other states, provided only that there is no unjust discrimination against one because of his nonresidence in the state." (33 Am. Jur. 350, 28; 15 C.J.S. 465, 466 and 476, §§111 and 115).

Insofar as interstate commerce is not involved it seems that the state, including its municipal corporations when duly authorized, may

impose upon hawkers and peddlers such license taxes as it may deem proper, so long as such license taxes are reasonable under the applicable circumstances, and do not burden interstate commerce. We entertain serious doubt as to the legality of charging a registration tax of persons residing outside of Lee county and making no such charge against those who represent business firms in Lee county. Although we entertain serious doubt as to the validity of said Ch. 65-1818, we have no authority to declare that such statute is invalid, that being the prerogative of the courts. The validity of an act such as this is presumed until a court of competent jurisdiction declares its invalidity by proper judgment or decree. If said Ch. 65-1818, conflicts with AGO 063-21, of Feb. 21, 1963, then said Ch. 65-1818 should be deemed the applicable law unless and until its invalidity, in whole or in part, has been determined by a court of competent jurisdiction.

065-133—December 27, 1965 (Revised)

REGULATION OF PROFESSIONS AND VOCATIONS

MEDICAL PRACTICE ACT—EMPLOYMENT BY STATE INSTITUTIONS OF PHYSICIANS NOT LICENSED IN THIS STATE

To: W. G. Hendricks, Business Manager, Board of Regents, Tallahassee

QUESTION:

When, if at all, may a physician, although duly licensed under the laws of another state or country, but not licensed under the laws of Florida, be employed by the student infirmary of the university of Florida, or other institution of higher learning of the said state, or other state institution?

Section 458.13, F. S., makes it unlawful for any person to practice medicine within the purview of Ch. 458, F. S., within the state unless and until such person has complied with the requirements of Ch. 458, including the taking of the examinations therein provided for becoming otherwise qualified and licensed thereunder. Such a violation of Ch. 458, F. S., is a felony under said §458.15, F. S., subject, however, to the provisions of §458.13(2), F. S. Said subsection makes certain specified exceptions from the operation of Ch. 458, F. S., including "any person employed as a physician in a state institution." The said provision exempting persons employed as physicians in a state institution, was inserted as §458.13(2)(j), F. S., by §10, Ch. 61-243.

The board of commissioners of state institutions, since Ch. 3578, 1885, (§837, R.S.: §1189, G.S.; §2297, R.G.S.; §394.03, F. S.) has been authorized to employ such physicians as may be necessary for the Florida state hospital. We find no statute, prior to Ch. 23675, 1947, limiting the medical practice in the Florida state hospital to residents of the state (§394.031, F. S.); however, such a rule is indicated by §394.031, F. S., permitting the employment of nonresident physicians by the board of commissioners, "when in need of additional medical personnel and unable to obtain such medical personnel residing in the state." Section 394.031, F. S., was extended to the state tuberculosis board by §7, Ch. 29868, 1955.

Said §394.031, F. S., may have been aimed at §112.02, F. S., requiring that state and county employees be bona fide residents of the state for 2 years or more next prior to their employment, and to

permit the employment of physicians who had not resided in Florida for the length of time required by said §112.02, F. S. This would seem to follow when the rule of statutory construction mentioned in 83 C.J.S. 554, et seq., §317, that: "Neither the government, whether federal or state, nor its agencies are considered to be within the purview of a statute unless an intention to include them is clearly manifested." The fact that §458.13, F. S., was amended by §10, Ch. 61-243, so as to exempt "any person employed as a physician in a state institution," from the operation of Ch. 458, F. S., at least in the light of the rule announced in 83 C.J.S. 554, §317, *supra*, poses the question of whether or not there may have been an intention to extend the requirement for licensing of physicians to public institutions; otherwise, the exemption would not appear to have been required.

If the amended statute be construed as being applicable to the state, its agencies and counties, then we come to the question of what was intended by the exemption of "any person employed as a physician in a state institution." In other words, what is a "state institution" within the intention and meaning of said provision. The provision in §17, Art. IV, State Const., that: "The Governor and the administrative officers of the Executive Department shall constitute a Board of Commissioners of State Institutions, which board shall have *supervision of all matters connected with such institutions* (meaning State Institutions) in such manner as shall be prescribed by law." (Emphasis supplied.)

We are advised by the Hon. J. B. Culpepper, chancellor of the board of regents, by letter under date of Dec. 14, 1965, "that the Board of Control (now Board of Regents) made an administrative determination *more than twenty years ago* that the institutions of higher learning under its jurisdiction were State Institutions and that so long as medical personnel employed therein were engaged exclusively on the medical staffs of such institutions and did not engage in private practice within the state, such personnel were not required by law to be licensed to practice medicine in the State of Florida." An examination of the operating budgets of the student infirmaries at the institutions reveals that provision has been made by the Florida legislature, or under its authority, for the biennium beginning July 1, 1965 and ending June 30, 1967, for the payment of salaries for the physicians employed by such institutions as aforesaid, notwithstanding that many of them are not licensed by the board of medical examiners. It is also our understanding that like budgets existed for the same purpose in prior bienniums.

From the above and foregoing it appears that both the Florida legislature, as well as the board of control, and its successor, the board of regents, have construed the Florida Statutes and laws as treating the student infirmaries of the institutions of higher learning of the state as being "state institutions" within the purview of §458.13(2)(j), F. S., as amended in 1961. The above construction by an administrative board and officers of the state, as well as the action by the legislature of the state in providing funds to meet expenses for the employment of the nonregistered physicians, amounts to a departmental, as well as a legislative, construction of said §458.13(2)(j), F. S., and is entitled to great weight in construing said statutory provision (30 Fla. Jur. 206 and 207, §103, and Florida cases cited; 82 C.J.S. 759-792, §§358-360; 50 Am. Jur. 309-312, §319).

From the above and foregoing we conclude that a physician, although duly licensed under the laws of another state or country, but not licensed under the laws of Florida, may be employed by the

student infirmary of the university of Florida, or other institution of higher learning of the state, or other state institution of Florida, providing that funds for the payment of the salary of such physician are made available by the legislature, or under its authority, provided that such physicians are otherwise qualified to hold such employment.

065-134—November 30, 1965

PUBLIC EDUCATION—SAFETY

USE OF INDUSTRIAL QUALITY EYE PROTECTIVE DEVICES BY STUDENTS, TEACHERS AND VISITORS IN INDUSTRIAL ART OR VOCATIONAL SHOPS OR CHEMICAL LABORATORIES

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Does participation in a course, as used in Ch. 65-526 (§232.45, F. S.), apply only to the individual while conducting the experiment or operating the equipment, or does it also apply to individuals in the same room in which the activity is being conducted?

2. Does milling, sawing, turning, shaping, cutting, grinding, or stamping of solid materials apply to both power-driven and hand-operated tools?

3. Does this law apply to junior high and elementary classrooms in which the instructor conducts a scientific experiment with the pupils observing?

4. If the school board furnishes safety glasses, must it also furnish safety glasses for those students requiring prescription lenses?

5. Does "kiln firing of any metal or other material" require that eye protective devices must be worn by students in junior and senior high art classes in which clay is baked in a kiln?

Chapter 65-526 (§232.45, F. S.), provides:

232.45 *Eye protection devices required in certain vocational and chemical laboratory courses.—*

(1) Every student and teacher in schools, colleges, and universities in this state shall be required to wear industrial quality eye protective devices when participating in any of the following courses:

(a) Vocational or industrial art shops or laboratories involving work with:

1. Hot molten metals;
2. Milling, sawing, turning, shaping, cutting, grinding, or stamping of any solid materials;
3. Heat treatment, tempering, or kiln firing of any metal or other materials;
4. Gas or electric arc welding;
5. Caustic or explosive materials.

(b) Chemical or combined chemical-physical laboratories involving caustic or explosive chemicals or hot liquids or solids.

(2) The boards of public instruction of the several counties may furnish such devices for students and teachers, and shall furnish such equipment for all visitors to such classrooms

or laboratories. A board of public instruction may purchase such devices in large quantities and sell them at cost to students and teachers.

(3) To implement and carry out the purpose of this act the boards of public instruction of the several counties are hereby given authority to promulgate rules and regulations to accomplish the purpose of the law.

(4) 'Industrial quality eye protective devices' as used in this act means devices meeting the requirements of the American standard safety code for head, eye and respiratory protection Z2, 1-1959, promulgated by the American standards association, incorporated.

The American standard safety code for head, eye and respiratory protection Z2, 1-1959 promulgated by the American standards ass'n, inc., provides detailed and explicit types of protective glasses, goggles and shields for various purposes varying as to size, resistance to heat and impact but said protective devices do not include a requirement for prescription lenses. (See p. 19, §6, eye protection of Z2, 1-1959 by the American standards ass'n.)

I believe all of your questions are answered by the above-quoted law of Florida and American standards ass'n rules.

Question 1 is answered in the affirmative. (It applies to all faculty and students involved, as well as to visitors.)

Questions 2 and 3 are answered in the affirmative.

Question 4 is answered as follows: All teachers and students participating in the courses or activities in the public schools, colleges and universities are required to wear the industrial eye protective devices contemplated in order to participate. They are not required to wear prescription lenses and the county boards of public instruction are not authorized to pay for prescription lenses. The county boards of public instruction and institutions of higher education may furnish the protective devices but are not required by law to do so, except to visitors.

Question 5 is answered in the affirmative in all cases where "heat treatment, tempering, or kiln firing of any metal or other materials" are used.

065-135—December 2, 1965

EDUCATION—COUNTY

COOPERATIVE AGREEMENTS WITH OTHER COUNTY, STATE AND NONPROFIT EDUCATIONAL ORGANIZATIONS—INSTRUCTIONAL SERVICES

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Can a county board enter into a cooperative agreement with a nonprofit private school to render instructional services to children?

2. If a county board cannot contract with a nonprofit private school for instructional services, with what types of nonprofit corporations and for what educational services may a county board contract under the provisions of §230.23(4)(k), F. S.?

Section 230.23(4)(k), F. S., provides, in part:

(k) *Cooperate with other agencies in joint projects.*—Adopt plans for cooperating with county boards of other counties in this state or in adjoining states or with other governmental agencies or with nonprofit corporations as provided in this act for such joint projects or activities as may be authorized by regulations of the state board. The conditions of such cooperation shall be as follows:

1. Establishment.—The project or activity shall be initiated by resolutions spread upon the minutes of each county board concerned.

2. Control.—The control and ownership of any physical property and the control and administration of any project or activity engaged in under the provisions of this section shall be vested in the board of public instruction of the county of location unless otherwise agreed by the county boards or unless the project or activity is undertaken as authorized in paragraph 3.

3. Other agencies.—The state board may, by regulation, authorize one or more county boards to engage in a contractual relationship with governmental agencies or with nonprofit corporations which have been formed and incorporated *for the purpose of providing a cooperative educational service to the counties.* (Emphasis supplied.)

Questions 1 and 2 are therefore answered in the affirmative subject to the following conditions and reservations:

a. That the procedure prescribed by state board of education regulations is followed as contemplated by the statute quoted above.

b. That the nonprofit corporation involved is not a church-operated facility within the meaning of §13, Art. XII, State Const., which provides in part, that county or district school funds shall not "be appropriated to or used for the support of any sectarian school."

065-136—December 2, 1965

EDUCATION—COUNTY SCHOOLS

FRANKLIN COUNTY—LOCATION OF SCHOOL AUTHORIZED BY CHS. 65-684 AND 65-1564, SPECIAL LAWS OF FLORIDA

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Under Chs. 65-684 and 65-1564, special acts of 1965, providing for distribution of race track funds and the issuance of revenue certificates for the construction of a comprehensive consolidated high school in Franklin county, is the board of public instruction of Franklin county required to build such school in Eastpoint?

Chapter 65-684, §1(3), allocates $70,000 for the purpose of issuing certificates of indebtedness and the proceeds of the same to be used in "constructing a centrally located, comprehensive, consolidated high school *in the county.*" (Emphasis supplied.)

Chapter 65-1564, §1 provides, somewhat more specifically, that the school be "located on the easterly side and in the *vicinity* of Eastpoint, on the most feasible site available." (Emphasis supplied.)

I am of the opinion that there is nothing in either of the 2 above-mentioned laws that would require the school to be within the corporate

limits of Eastpoint but that it was the intent of the legislature that it be built "on the most feasible site available" within the area described as "on the easterly side and in the vicinity of Eastpoint."

065-137—December 7, 1965

TAXATION

VALUATION ERRORS RESULTING IN MILLAGE ERRORS AND REDUCED TAX MONEY

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. Where the tax assessor, in totaling the valuations placed by him upon the taxable real or tangible personal property in his county, through errors of his office, his bookkeeping, calculating and data calculating equipment, obtains a valuation greatly in excess of the actual totals of such property, largely through the duplication of some of the totals placed in such equipment, and millages are levied on such totals, may such errors be corrected if discovered before the tax bills have been mailed out?

2. Is the notice contained in §129.05, F. S., and §10, Ch. 26084, 1949, required to be published under the circumstances set out in question 1?

3. Is the comptroller required to furnish Orange county a second set of tax bills at state expense, and if not, where does the responsibility of payment for said tax bills lie?

The totals of the value of the taxable real property in Orange county, for the tax year of 1965, were originally determined by the data processing department of the tax assessor's office for said county to have been about $1,041,605,471, which figure was used. Under the statutes and laws of Florida, as soon as the county tax rolls have been equalized and the totals of assessed values have been calculated and determined, the county assessor of taxes is required to notify the board of county commissioners and the school board, as well as all other spending agencies having taxes assessed upon the said tax roll, the total tax valuations in their county, as to agencies having the power of county-wide taxation, and the total tax valuations in their taxing districts or areas, as to agencies having the power of taxation over areas within the county but less than county-wide. (See §§129.03 and 237.18, F. S., and applicable statutes and laws of agencies having jurisdiction less than county-wide). These figures are used for the purpose of determining the tax millages necessary to meet the requirements of the budgets of the spending agencies. In complying with these requirements the county assessor of taxes, because of the erroneous totals of tax valuations resulting from data processing errors, the total assessed valuations certified to the county-wide spending agencies, were substantially $1,041,605,471, which amount has, upon recalculations and checks made by and in the data processing department, been determined to be excessive by substantially $54,000,000, so that the actual total property valuations in said Orange county, are and should have been $987,867,236, instead of the said $1,041,605,471; these figures are approximate if not exact. We do not have before us the exact original and corrected valuations of the taxing districts and agencies whose taxing powers are not county-wide, but relate to areas less than the entire county. The principles of the right of the county taxing

officials to correct such errors apply also to the taxing officials of districts and agencies having taxing power over portions, but not all, of the said county.

The said errors in calculations clearly appear to have been unintentional and were unknown to the taxing officials until checks and rechecks thereof were made by the tax assessor's office, probably as a matter of course and to guard against mechanical and human error which, although remote, is always a possibility however remote. We come next to the question of the force and effect of such errors in the assessor's certificates of the taxable values of the county and each separate district or taxing area, and the result or results stemming from such errors. Tax millages are determined by determining the millage necessary to be imposed on taxable properties to produce the amount budgeted for a particular purpose. This is done by dividing the amount of the sum budgeted by the total assessed valuation. By way of example, to demonstrate the effect of the 2 tax valuations above-mentioned, 1 mill levied on the valuation of $1,041,605,471 would produce the sum of $1,041,605.47, while the same millage imposed on the valuation of $987,-867,236 would produce the sum of $987,867.24, or a difference of $53,738.23 in the amount of taxes produced. Even a 1 mill tax, as above-demonstrated, when applied to the 2 valuations, results in a substantial difference of taxes produced. Operating budgets doubtless have been adopted and approved, and contracts have been made and entered into on the strength of the erroneous valuation, so that a material injury may result to the county and the public schools upon the lower valuation if no adjustment of the tax millages imposed is made. This brings us to the application of §192.21, F. S., to the circumstances above-described and discussed.

Said §192.21, F. S., insofar as here material, that:

> *No act of omission or commission* on the part of *any tax assessor* or assistant tax assessor, or any tax collector, or any board of county commissioners, or any clerk of the circuit court or any officer of this state . . . shall operate to defeat the payment of said taxes; but any such acts of *omission or commission* may be corrected at any time by the officer or party responsible for the same in like manner as the same is now or may hereafter be provided by law for performing such acts in the first place, and when so corrected they shall be construed as valid ab initio and shall in no way affect the process by law for the enforcement of the collection of any such tax . . . (Emphasis supplied.)

The quoted language first appeared as a part of §1, Ch. 10040, 1925. Mr. chief justice Davis, speaking for the court in State v. Lummus, 111 Fla. 746, 149 So. 650, text 651, said that:

> The effect of the statute (Ch. 10040, 1925) is to impose upon the tax assessor a continuing duty to prepare according to law a legal tax roll, and, if through oversight, mistake or inadvertence he has failed to do so, the statute itself affords ample power and authority for the tax assessor to correct his mistake in the preparation of the toll by forthwith making the necessary changes and amendments of the roll to make the same conform to the 'form of things' required by the tax laws . . .

Said §192.21, F. S., also provides in part that:

> All taxes imposed pursuant to the constitution and laws of this state shall be a first lien superior to all other liens on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment, . . .

with the above-quoted portion of the said section relative to the acts of omission and commission on the part of taxing officials following the last above quotation. In Ranger Realty Co. v. Hefty, 112 Fla. 654, 152 So. 439, text 442, after referring to said Ch. 10040, 1925, as amended by Ch. 14572, 1929, which added to but did not change the portions of the statute above-mentioned, said that: "Invalid assessments do not impair statutory liens for valid tax levies." In Fort Myers v. Heitman, 149 Fla. 203, 5 So.2d 410, text 412, the court remarked that the principle established for state taxation by the said 1925 act as amended, now appearing with amendments as §192.21, F. S., "is that no act of omission or commission in making assessments for ad valorem taxation shall operate to defeat the payment of duly authorized taxes, but such acts of omission or commission may be corrected at any time, and when so corrected shall be valid ab initio and the assessment enforced."

In Thompson v. Key West, Fla., 82 So.2d 749, it was held that an erroneous tax description of lands, capable of correction, was no bar to the tax lien provided for in said §192.21, F. S. In Goodman v. Carter, 158 Fla. 112, 27 So.2d 749, the clerk of the circuit court used the forms prescribed in tax deed proceedings by Ch. 17457, 1935, instead of the form prescribed by Ch. 20722, 1941, which was the applicable statute. The said 1937 statute provided for a tax deed running from the state, instead of from the county as provided in the 1941 act; the court held the error was not sufficient to nullify the said tax deed. In State *ex rel* Ranger Realty Co. v. Lummus, 111 Fla. 746, 149 So. 650, the court held that the legislature had ample power to require the taxing officials to correct errors in their procedures and in their records, and that an illegal assessment may be amended where the tax is authorized. In State v. Gay, 133 Fla. 826, 183 So. 463, the court held a tax lien against lands subject to redemption notwithstanding the failure of the tax collector to issue a tax sale certificate.

The term "omission" denotes a negative and inaction; a state of being omitted; a neglect or failure to do something; that which is left undone (29 Words and Phrases, Perm. Ed. 408 and 409). In Brown v. Louisiana & Northwest R.R. Co., 118 La. 87, 42 So. 656, the court held that the railroad company in closing or obstructing a drain so as to damage the lands and crops of a landowner, was an act of "commission" and not one of "omission." In Cleveland Ry. Co. v. Johnson, 32 Ohio Law Report 97, the failure of a judge to give a charge distinguishing between certain acts of damage was held to be an act of "omission" and not one of "commission." The act of the tax assessor's office in the duplications occurring in its calculation of valuation totals appears to have been an act of "commission" as distinguished from an act of "omission," although should we consider it to be an act of "omission," it would still be within the purview of §192.21, F. S., and subject to correction thereunder.

Prior to the enactment of Ch. 10040, 1925, now appearing with amendments, additions and extensions as §192.21, F. S., taxing statutes, acts and laws in this state were held mandatory so that any failure to conform thereto resulted in an invalid assessment and tax. Said §192.21, F. S., provides in part that: "All provisions of law now existing or which may be hereafter enacted relating to the assessment and collection of revenue (unless otherwise specifically so declared) shall be deemed and held to be directory only . . ."

In the light of the above and foregoing, we hold that the first above-stated question should be and it is hereby answered in the affirmative.

Having held, in our reply to question 1, that the error or errors

mentioned therein may be corrected under the authority of §192.21, F. S., the question of the procedures by and through which such errors may be corrected arise. It is our understanding that the budgets of the spending agencies in Orange county, including the board of county commissioners and the county board of education, were made and adopted in accordance with the provisions of Ch. 26084, 1949, establishing and relating to the Orange county budget commission, Ch. 129, F. S., relating to county annual budgets, and §§237.05-237.24, F. S., relating to county school budgets. We must presume such budgets were duly and properly made in accordance with such statutes. Such budgets, having been duly adopted under and pursuant to said statutes and laws, have the force and effect of fixed appropriations, and may not be altered, amended or exceeded by the spending agencies involved. (§§195.05 and 237.19, F. S., and §14, Ch. 26084, 1949.) This budget would have been applicable and would have been followed whatever the total valuations of the taxable properties were fixed and determined. Had the proper valuation of $987,867,236 been arrived at, instead of the erroneous valuation of $1,041,605,471, the procedures to have been followed would have differed in no manner; in either case the procedures provided by statute would have been the same. We find no error in the preparation and adoption of the several county and local budgets for which taxes may be imposed.

Upon the adoption of the several spending budgets, and the determination of the amounts provided for or appropriated therein, millages to be levied are determined by dividing the applicable assessed valuations "into an amount, ninety-five per cent of which is the amount budgeted to be received from taxes . . ." (§129.05, F. S.; see also §237.18, F. S.). The only error made in determining and fixing the millages heretofore fixed and determined, was the use of an erroneous total tax valuation, some $54,000,000 in excess of the true total of the valuations on the current tax roll. The error consisted of the use of an erroneous total valuation of taxable properties in the county of $1,041,605,471, instead of the actual and correct total of $987,867,236, an amount of some $53,738,235 in excess of the actual total valuation. The notices required to be published, by §12, Ch. 26084, 1949 (the Orange county budget law) seem to relate primarily to the proposed amounts and items to be included in the budgets. After the budgetary proceedings have been completed and the spending budgets have been determined and adopted, millages are determined, as provided in §192.05, F. S., by dividing the assessed valuation into 95% of the budgeted amounts. Neither §§129.05, 237.18, F. S., nor §10, Ch. 26084, 1949, expressly require that notice of the millages levied be published in a newspaper or otherwise; the notices provided for appear to be notices concerning the budgetary proceedings. Under §192.21, F. S., and §16, Ch. 26084, 1949, such proceedings appear to be directory only and not mandatory, and in the language of said §16 of Ch. 26084, "shall not invalidate any tax or assessment in connection therewith."

We are inclined to the view that question 2 should be answered in the negative; however, it may be advisable that a notice be published for 1 time in a newspaper of general circulation advising that a millage of _____ will be imposed for the purposes specified.

We come now to question 3, that is, whether or not the amount necessary for the corrected tax bills, made necessary by the above-mentioned error, and the redetermination of the millages to be imposed, should be paid from intangible personal property tax funds, under §199.331(3), F. S., notwithstanding that funds have already been paid or obligated from such funds for the printing of tax bills for tax

bills rendered invalid by the above-mentioned error in total valuations. Such additional tax bills have resulted by errors evidently occurring in the tax assessor's office for Orange county, for which neither the state nor any of its agencies is responsible; neither was the error that of the printer of such tax bill forms.

The responsibility for such error can be determined only when all the facts have been ascertained; presently we determine that the state and its officers and agencies were not responsible for the same and that the state is not required to stand the cost of the new tax bills made necessary by the said error.

065-138—December 13, 1965

EDUCATION—COUNTY PERSONNEL

PROFESSIONAL NEGOTIATIONS AGREEMENT—CERTIFIED PERSONNEL—POWERS OF COUNTY BOARDS OF PUBLIC INSTRUCTION

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

May a county board of public instruction, under the provision of §230.22(1), F. S., as amended by Ch. 65-239, enter into a professional negotiations agreement with a classroom teachers' association to consider problems affecting certified personnel without having individuals on the negotiations committee from all work levels of administrative and instructional personnel?

Section 230.22, F. S., provides:

General powers of county board.—The county board, after considering recommendations submitted by the county superintendent, shall exercise the following general powers:

(1) DETERMINE POLICIES.—The county board shall determine and adopt such policies as are deemed necessary by it for the efficient operation and general improvement of the county school system. In arriving at a determination of policies affecting certificated personnel, the county board may appoint or recognize existing committees composed of members of the teaching profession, as defined in the professional teaching practices act, §§231.54-231.59. *When such committees are involved in the consideration of policies for resolving problems or reaching agreements affecting certificated personnel the committee membership shall include certificated personnel representing all work levels of such instructional and administrative personnel as defined in the school code.* (Emphasis supplied.)

In view of the above, your question is answered in the negative.

It should also be noted that the "professional negotiations agreement" contemplated should not be misconstrued to imply the right of the county board of public instruction to delegate its statutory powers and duties as provided by law to any individual, committee or other group.

It would appear clear that the intent of §230.23, F. S., is to authorize the creation of professional committees when necessary to act in an advisory capacity to assist the board in making a final determination on policy questions.

065-139—December 15, 1965

CRIMES—GAMBLING

GAMES OF CHANCE, CONSIDERATION PRIZE—CONSTRUCTION OF §616.091, F. S.

To: Paul Antinori, Jr., State Attorney, Tampa

QUESTIONS:

1. Does the operation of games of skill wherein prizes are given to a successful player who has paid the concessionaire a monetary consideration for the opportunity to play, constitute gambling under §849.14, F. S.?

2. If the answer to question 1 is in the affirmative, are the games described in §616.091, F. S., specifically excluded from the operation of the gambling laws, particularly in view of the express admonitions and prohibitions set forth in §§616.09 and 616.091(1)(l), F. S.?

3. If the answer to questions 1 and 2 are both in the affirmative, is the enactment of Ch. 63-247, (§616.091, F. S.) constitutional under §16, Art III, State Const., requiring sufficient expression in the title of the act, since the act in question purports to repeal in part the gambling laws of the state?

AS TO QUESTION 1:

It is my opinion that the operation described in question 1 violates §849.14, F. S., which reads as follows:

> 849.14 *Unlawful to bet on result of trial or contest of skill, etc.*—Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of gambling, and shall be punished by imprisonment not exceeding six months or by fine not exceeding five hundred dollars.

A trial of skill is involved when a player plays a game of skill in the hope that he will play it so skillfully as to win a valuable prize which he will receive from the operator if he meets the required standard of excellence.

When a player pays a monetary consideration for the opportunity to play such a game, he also bets or wagers such monetary consideration against the prize offered by the operator. The words "bet" and "wager" are defined in 38 C.J.S. 43-44, Gaming, §1-c(1), as follows:

> The definitions of 'bet' and 'wager' ordinarily given imply that there must be two or more contracting parties having mutual or reciprocal rights with respect to the money or other things that are wagered, and usually called the stakes of the bet or wager, and that each of the parties shall jeopardize something, and have the chance to make something or to recover the stakes or thing bet or wagered on the determination of the contingent or uncertain event in his favor; but accord-

> ing to some decisions it is not essential that both parties should stand to lose, it being sufficient if one party stands to lose or win. . .

The transaction between the operator and the player meets this definition. There are two contracting parties, viz., the operator and the player. They have mutual rights with respect to the money and prize that are wagered, that is, the player receives the operator's prize if he wins, and the operator gets the money paid by the player, with no return to the player if he fails to win. Each of them jeopardizes something; the player jeopardizes his money and the operator jeopardizes a prize. Each has the chance to make something on the determination of the contingent or uncertain event of whether the player will play the game with such skill as to win the prize.

It is true that the money paid by the player buys an opportunity to play the game, but it is equally true that his money also furnishes a consideration which he bets or wagers against the prize offered by the operator. A merchant conducts a gambling operation when he sells goods for their market value and by way of inducement gives the purchaser a chance to win a prize by chance. The reason for this is that the money which the purchaser pays for the goods also furnishes the consideration for a chance to win the prize. (See 54 C.J.S. 850-851, Lotteries, §4; 34 Am. Jur. 654, Lotteries, §10.) Likewise, a person conducts a gambling operation when he sells bonds issued for the purpose of obtaining a loan when the bonds undertake to pay the principal with interest and also any additional sum which the holder may win at a drawing, since the money paid for the bonds also furnishes the consideration for the chance to win something for nothing. (See 54 C.J.S. 857, Lotteries, §10b; 34 Am. Jur. 658, Lotteries, §15.) By the same token, the money paid to the operator of a skill game not only pays for the opportunity to play the game but also furnishes the consideration for the chance to get the operator's prize for nothing, with the result that the money is bet or wagered against the prize.

The very purpose of the operator's offer of a valuable prize, which in most instances is worth more than the amount of money paid by the player, is to induce people to pay for playing games when they would not otherwise be interested in doing so. Most of the people who pay their money are induced to do so by the offer of a prize; if no prize were offered, they would not pay for the opportunity to play the game. In determining whether a given operation constitutes gambling, the courts look to substance rather than form and when we look at the substance of a game of the kind here under consideration, it is apparent that the player actually pays his money as a bet or wager against the prize offered by the operator and the operator throws in for good measure the means of ascertaining the result, that is to say, he furnishes the place to play and the equipment with which to play.

For the purpose of illustration, let us assume that the operator raises his charge to $10 and agrees to give the player a prize worth $100 if he wins the game. In such a case, it could hardly be doubted that the $10 paid by the player constitutes a bet or wager against the operator's prize. And the fact that in the ordinary operation of this sort the player puts up a sum much smaller than $10 against the operator's prize worth much less than $100 in no way minimizes the fact that the sum paid by the player is a bet or wager.

Consequently, I think that the operation mentioned in question 1 falls under the condemnation of said §849.14, F. S., and that said question is properly answered in the affirmative.

The foregoing construction of §849.14, F. S., is in accord with the views expressed by my predecessor in office, Hon. Richard W. Ervin, in AGO 055-60 (attorney general's biennial report, 1955-1956, p. 80, and opinion 055-189 p. 246).

Further, I am of the opinion that the operator of the skill game mentioned in said question violates §849.01, F. S., which provides that:

> 849.01 *Keeping gambling houses, etc.*—Whoever by himself, his servant, clerk or agent, or in any other manner has, keeps, exercises or maintains a gaming table or room, or gaming implements or apparatus, or house, booth, tent, shelter or other place for the purpose of gaming or gambling or in any place of which he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whatever, whether heretofore prohibited or not, shall be punished by imprisonment in the state prison not exceeding three years, or by fine not exceeding five thousand dollars.

The purpose and intent of said §849.01, F. S., was dealt with by the Sup. Ct. of Fla., in McBride v. State, 22 So. 711, in words as follows:

> The purpose and intent of the section of the statute under discussion was to prohibit, not the gaming or gambling itself, but the keeping of a house or other place for any manner of gaming or gambling. If money or other thing of value is staked or wagered therein upon any result or event whatsoever, such house falls within the inhibition of this statute, whether the means adopted for the decision of the question as to who is the winner or loser of the amount wagered be a game prohibited by law or not.

and in the same case, the Sup. Ct. of Fla., said that:

> The consensus of the better opinions is that the wagering, betting, or laying of money or other thing of value upon the transpiring of any event whatsoever, whether it be upon the result of a game of chance or upon a contest of skill, strength, speed, or endurance, whereby one party gains and the other loses something for nothing, whether the parties betting be the actors in the event upon which their wager is laid or not, is gaming or gambling, within the meaning of these acts.

I think that when the operator of a skill game permits a person to put up a sum of money for which he receives two things, 1. the right to play a skill game, and 2. an opportunity to win a valuable prize, the operator is permitting the player to play at a game for a valuable thing within the condemnation of said §849.01, F. S.

AS TO QUESTION 2:

I find nothing in §616.091, F. S., which excludes the games therein described from the operation of the gambling laws.

Section 616.091, F. S., was first enacted in 1963. Subsection (1)-(a)-(kk), purports to do no more than establish trade standards for the operation of shows and amusement devices in connection with public fairs and expositions, and subsection (2), which contains paragraphs (a)-(r), merely specifies safety standards for the operation of amusement devices and temporary structures at public fairs and expositions.

The same Ch. 63-247, which brought §616.091, F. S., into being amended the previously existing §616.09, F. S., in particulars which are not pertinent to this discussion, so as to cause the same to read:

> 616.09 *Not authorized to carry on gambling, etc.; forfeiture of charter for violations; annulment proceedings.*—

> Nothing in this chapter shall be held or construed to authorize or permit any association organized hereunder to carry on, conduct, supervise, permit or suffer any gambling or game of chance, lottery, betting or other act in violation of the criminal laws of the state; provided that nothing in this chapter shall permit horse or dog racing or any other pari-mutuel wagering, for money or upon which money is placed, and any association organized under this chapter which shall violate any of said laws or which shall knowingly permit the same to be done shall be subject to forfeiture of its charter; and if any citizen shall complain to the attorney general that any association organized under this chapter was organized for or is being used as a cover to evade any of the laws of Florida against crime, and shall submit prima facie evidence to sustain such charge, the attorney general shall institute, and in due time prosecute to final judgment such proceedings as may be necessary to annul the charter and incorporation of such association, and writs of injunction or other extraordinary process shall be issued by courts of competent jurisdiction on the application of the attorney general on complaint pending any such annulment proceeding and in aid thereof, and all such cases shall be given precedence over all civil cases pending in such courts, and shall be heard and disposed of with as little delay as practicable.

This indicated that, despite the enactment of §616.091, F. S., the legislature intended to retain the prohibitions of §616.09, F. S., against gambling.

Furthermore, §616.091(1)(l), F. S., specifically recognizes that Florida law forbids gambling at fairs by saying:

> Since the Florida law forbids lotteries, *gambling*, raffles, and other games of chance at community, county, district and state fairs, and since enforcement is the responsibility of local boards and authorities, the inspectors will have fulfilled their responsibility by informing the local fair association and the agricultural and livestock fair committee in writing whenever they observe such illegal pursuits. (Emphasis supplied.)

I am not unaware of the opinion of the Sup. Ct. of Fla., in the case of Carswell, Tax Collector v. State *ex rel* Marlowe, 159 So. 15, which involved a mandamus action to coerce the tax collector to collect occupational license taxes from persons operating amusements at a public fair, which opinion (p. 19) contains expressions as to the need for fair associations to provide amusements and attractions for the public. However, following said expressions, and on the same page, the Sup. Ct. took care to point out that:

> . . . *There is no question* involved here *challenging the legality of the amusements* offered or the concessions employed except for the nonpayment of the tax, *and, assuming that they were all proper enterprises* to be conducted for the patronage of the public, then it would seem that for the fair association to be denied the right to show its necessity for resorting to such legitimate means to produce money with which to conduct its agricultural, horticultural, and live stock exhibitions would be to deny the association the right to prove the very elements which in part justify its conducting these concessions. (Emphasis supplied.)

and it is clear from a perusal of the court's entire opinion that it in no way dealt with or decided the legality of the operation of the amuse-

ments and attractions involved in the case. Therefore, the decision in that case in no way conflicts with the views herein expressed.

Question 2 is answered in the negative.

AS TO QUESTION 3:

Question 3 does not require an answer because it requests one only in the event that questions 1 and 2 are both answered in the affirmative, and question 2 has been answered in the negative.

However, I deem it appropriate to observe that Ch. 63-247, which first enacted §616.091, F. S., has been incorporated in the 1965 revision of the Florida Statutes by Ch. 65-1, and that the Sup. Ct. of Fla., has said that any defect in the title to an act of the legislature is cured by the inclusion of the act in a revision of the statutes (Spangler v. Florida State Turnpike Authority, 106 So.2d 421).

065-140—December 15, 1965

TAXATION

EXEMPTION—STATE-OWNED MURPHY ACT LANDS

To: Robert C. Parker, Director, Trustees of the Internal Improvement Trust Fund, Tallahassee

QUESTIONS:

> **1. May special assessments or other taxes be levied by any special taxing district against Murphy act lands owned by the state and administered by the trustees of the internal improvement trust fund?**
>
> **2. Are Murphy act lands subject to normal ad valorem taxes to secure funds for county operations?**

Lands which are designated as Murphy act lands became the absolute property of the state by authority of Ch. 18296, 1937, as subsequently amended and now carried into §192.38, F. S. These lands are administered by the trustees of the internal improvement trust fund, but the fee simple title to such lands was absolutely vested in the state.

Thus these lands differ in ownership from those conveyed to the state by the U. S. as reflected in §§253.01-253.03 and §253.12, F. S. Murphy act lands are administered by the trustees, but their title is in the state. Title to sovereignty lands and certain other classifications is in the 5 trustees.

Section 378.30, F. S., provides:

> Land held by the trustees of the internal improvement trust fund shall be subject to the tax imposed under authority of this chapter, . . . For facilitating the assessment of district taxes on land of said fund, the trustees thereof are authorized to prepare lists of land held by them and, timely for the purpose, to transmit a list of said land to the tax assessor of each county in which such land is located, . . .

Certain other sovereignty lands, title to which is in the trustees, are excluded from taxation by §378.30, F. S., which applies only to assessments by the central and southern Florida flood control district.

Section 192.06, F. S., lists property exempt from taxation as, among others: "All property, real and personal, . . . of this state . . ."

Section 192.08, F. S., in amplification of this exemption, reads in part:

> No taxes or special assessments shall be levied by any taxing district, special taxing district, or other governmental unit

or agency created for the purposes of taxation, against lands or other property of the state, except for the purpose of improving the actual physical condition of such lands or other property, and for such purpose, only upon the approval of such levy by that state agency or department in which title to such lands or other property is vested, or having jurisdiction over such lands or other property.

In considering this same question, this office in AGO 052-156, p. 434 of the biennial report for 1951-1952, adds this:

> It is also a general rule of law that the property of a state is not subject to taxation in the absence of a statute providing therefor (61 C.J. 366, §359; 51 Am. Jur. 550, §557)
>
> The State is not considered to be within the purview of statutes and laws, however general and comprehensive, unless an intention to include the State is clearly manifest from such statutes or laws (51 C.J. 1103 and 1121, §§653 and 663).

There is no question that a sovereign state can, if it chooses through its legislature, subject state lands to taxation. (See AGO 048-57, p. 182 of the biennial report for 1947-1948, referring to 51 Am. Jur. 552, §560.) But such choice must be shown by "most positive legislative enactment."

". . . the question whether public property shall be assessed for local improvements depends solely on the legislative will. The power to subject public property to assessments for local improvements does not exist in the absence of statutes conferring it, and it has been held that the power must be conferred either in express terms, or by necessary implication." 63 C.J.S. p. 1066, §1332, citing Blake v. City of Tampa, 115 Fla. 348, 156 So. 97.

There is no question also that state lands in the former everglades drainage district were subject to an assessment for drainage, but this was due to express legislative determination that such lands would be so assessed. State v. Everglades Drainage District, *et al.*, Fla., 20 So.2d 397. On the other hand, school lands and sovereignty lands have never been taxed to support the drainage project. And from the opinion on State v. Everglades Drainage District, *supra:* "It is too well settled to require the citation of authority to support it that constitutional and statutory exemption from taxation is limited to State and county purposes and has no reference to special assessments."

The central and southern Florida flood control district assesses and collects an annual tax on the real property in the district. (§378.20, F. S.)

"Land held by the trustees of the internal improvement trust fund shall be subject to the tax imposed under the authority of this chapter . . ." (§378.30, F. S.)

Murphy act lands are not held by the trustees, but are absolutely vested in the state of Florida by §192.38, F. S. The state then, through the trustees of the internal improvement fund, may sell, lease or otherwise dispose of these lands.

While it is held generally, as in State v. Warren, Fla., 57 So.2d 337, for example, that the state through the legislature has the undoubted power to compel its own lands to submit to local taxation or to assessments for benefits, the legislature has not chosen to do so in several notable instances, and Murphy act lands are included among those state-owned lands which the legislature has not chosen to submit to taxation by special districts, by counties or by municipalities.

Questions 1 and 2 therefore, are answered in the negative, unless there is specific legislative authority for such special assessments.

065-141—December 21, 1965

MOTOR VEHICLE LICENSES—AD VALOREM TAXATION

LICENSES AND LICENSE TAXES AGAINST MOBILE HOMES, TRAILER COACHES, ETC.

To: Arch Livingston, Director, Department of Motor Vehicles, Tallahassee

QUESTION:

1. Does the period for which annual license taxes are imposed by Ch. 65-446 run concurrently with the calendar year, or run concurrently with the registration period as provided in §320.07(1), F. S., or by a special license year beginning with Nov. 2, of each year?

2. Where trailer coaches or mobile homes have been assessed as tangible personal property by the tax assessors of the several counties and placed upon the personal property tax rolls for 1965 under Palethorpe v. Thomson, 171 So.2d 526, what action should be taken by the director of the department of motor vehicles in regard to the licensing of such trailers for whatever partial year may elapse between the effective date of Ch. 65-446 and the beginning of the annual registration period referred to in question 1?

Section 13, Art. IX, State Const., was amended at the general election in Nov. 1965, so as to define the phrase "motor vehicles" as therein defined, so as to include "mobile homes, trailer coaches, house trailers, camper type mobile homes mounted and transported wholly upon the body of a self-propelled vehicle, or any type of trailer or vehicle body without independent motive power . . ."

It seems evident that the purpose of this amendment was to overcome the holding of the Fla. Sup. Ct. in Palethorpe v. Thomson, Fla., 171 So.2d 526, holding such mobile homes, trailer coaches, house trailers, etc., not to be "motor vehicles" within the purview of said §13, Art. IX, State Const., prior to its said 1965 amendment. This section of the State Const., as amended, having not fixed its own effective date, became effective immediately upon its adoption at the general election in Nov. 1965, that is, Wed., Nov. 3, 1965. (Advisory Opinion 152 Fla. 686, 12 So.2d 876; Porter v. First Nat. Bank, 96 Fla. 740, 119 So. 130; Perry v. Consolidated Special Tax School Dist., 89 Fla. 271, 103 So. 639; Advisory Opinion, 34 Fla. 500, 16 So. 410.) Chapter 65-446, is the enforcement act to make the said constitutional amendment effective and operative. Under §5 of said Ch. 65-446, it became effective immediately after the approval of the said constitutional amendment, that is, Nov. 3, 1965; this being true, said Ch. 65-446 became effective on said Nov. 3, 1965.

It is provided in §320.081(2), F. S., as amended by Ch. 65-446, that: "There are hereby levied and imposed annual license taxes to be paid by the owners and operators of mobile homes in this state upon the registration or reregistration of the following mobile homes:" Then follows the schedule of license fees, ranging from a $20 license fee for mobile homes not exceeding 35 feet in length to $80 for mobile homes over 65 feet in length. Under both the constitutional amendment and said §320.081, F. S., as amended by Ch. 65-446, the annual license fees so prescribed and imposed "shall be in lieu of ad valorem taxes."

In the words of the constitution such mobile homes are "subject to

only one form of taxation which shall be a license tax." Under the opinion and judgment of the Sup. Ct. in Palethorpe v. Thomson, Fla., 171 So.2d 526, mobile homes, trailer coaches, house trailers, etc., not used primarily for transportation purposes, were subject to ad valorem taxation for the tax year of 1965, and it is to be presumed that most, if not all, of such mobile homes, trailer coaches, house trailers, etc., were subjected to 1965 personal property ad valorem taxes, which taxes became a lien on the said mobile homes or trailers, and their owners became liable for the payment of such taxes. This lien, under §200.02, F. S., as amended by §14, Ch. 63-572, became effective as of Jan. 1, 1965, and due and payable on Nov. 1, 1965, or as soon thereafter as the tax roll came into the hands of the county tax collector. These taxes accrued on said Jan. 1, 1965, for the entire year and became a lien as of that date. The 1965 amendment of said §13, Art. IX, State Const. is not, by its terms, retroactive so as to nullify the assessments imposed on mobile homes, trailers, etc., for 1965, in which case the taxes so assessed for 1965 were and are a valid assessment, subject to enforcement and collection by the tax collectors of the counties wherein imposed.

Under the amendment of §13, Art. IX, State Const., license taxes on mobile homes, trailers, etc., are in lieu of ad valorem taxes. We feel that as to those already paying or obligated to pay an ad valorem tax on mobile homes, trailers, etc., for the year 1965, §320.081(2), F. S., as enacted by Ch. 65-446, should be deemed operative as of Jan. 1, 1966. As to mobile homes, trailers, etc., on which no ad valorem tax is required in 1965, the license tax provided by said §320.081(2), F. S., as enacted by Ch. 65-446, should be applicable as of Nov. 3, 1965.

Another of your questions is whether the license year should run concurrently with the calendar year, or with the license year for automobiles, trucks, motorcycles, and other motor vehicles as is provided for in §320.08, F. S., as amended. The licensing of mobile homes and trailers under §320.081, F. S., as amended by Ch. 65-446, differs little, if any, from the licensing of motor vehicles generally under §320.08, F. S., and a construction of said §§320.08 and 320.081, F. S., reveals no reasonable reason for allocating in §320.08, F. S., one license year and in §320.081, F. S., another license year. We do not think that the legislature intended to adopt different license years for said §§320.08 and 320.081, F. S., and, therefore, hold that the license year provided for in §320.07, F. S., is applicable to both §§320.08 and 320.081, F. S.

These statutes, laws and constitutional provisions, together with the above observations and authorities, lead to the following conclusions:

1. The period of annual license taxes imposed by §320.081, F. S., as added by Ch. 65-446, begins and runs concurrently with the provisions and requirements of §320.07, F. S., and concurrently with motor vehicle license taxes generally.

2. The fact that said §320.081, F. S., became a law and operative on Nov. 3, 1965, brought into being a partial license year beginning on said date, and running to the end of the current license year, under §320.07, F. S.

3. However, where an ad valorem tax has been paid on the mobile home or trailer in question for the tax year of 1965, said partial license year should begin on Jan. 1, 1966.

066-1—January 18, 1966

COUNTY PUBLIC SCHOOLS

SALARY SCHEDULES FOR INSTRUCTIONAL PERSONNEL—BASIS

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Does a county board of public instruction have the legal authority, in developing the annual salary schedule for instructional personnel, to provide salary differentials based on performance on the national teachers examination or the graduate record examination, as long as the minimum salaries prescribed in §§236.02(6)(a) and 236.07(3)(c), F. S., are included in such schedule?

Section 236.07(3)(c), F. S., provides the procedure to be followed at the state level in determining amounts to be included for instructional salaries and for the allocation from state funds. Said act provides, in part: ". . . These amounts are to be used only for apportionment purposes *and are not to be construed as a state salary schedule.*" (Emphasis supplied.)

Section 236.02(6), F. S., provides, in part:

> SALARY SCHEDULES.—Expend funds for salaries in accordance with a salary schedule or schedules adopted by the county board in accordance with the provisions of law and regulations of the state board.
>
> (a) Such schedule or schedules for instructional personnel shall make provision for the following:
>
> 1. A minimum annual salary of four thousand dollars for each member of the instructional staff to whom a continuing contract has been issued; and
>
> 2. Additional yearly increments to each such member under continuing contract, in recognition of experience and professional growth, assuring a minimum annual salary of five thousand dollars, commencing with the eleventh year of efficient teaching service in the public school system of this state, and including the services set forth in §238.01(4).
>
> 3. *In addition to factors of training and experience the county school board may adopt additional factors as incentives for the determination and recognition of superior teaching and service in the program of instruction.* (Emphasis supplied.)

In view of the above, it is my opinion that additional salary incentives from county funds are discretionary with the local board of public instruction.

Your question is therefore answered in the affirmative.

066-2—January 18, 1966

JUVENILES

FINGERPRINTING WITH CONSENT OF PARENTS WHEN JUVENILE NOT IN CUSTODY

To: Lt. James C. Brown, Police Department, Orlando

QUESTION:

May a child under the age of 17 years not in the custody of the juvenile court or any law enforcement agency be fingerprinted if consent for such fingerprinting is received by the law enforcement agency in question from the child's parent or guardian in written form?

As you are well aware, I am sure, Ch. 39, F. S., sets out the jurisdiction and the authority of the juvenile courts of this state and, therefore, the answer to your question must be arrived at by an examination of this section of the law and any other relevant authorities. The purpose of Ch. 39, F. S., is to establish a special tribunal having jurisdiction within prescribed limits of cases relating to the moral and physical well-being of children to the end that they may be directed away from the path of crime.

It is my understanding, from the limited facts which you have submitted with your request, that the city of Orlando, in the recent past, has been plagued by numerous house burglaries. Some of the persons responsible have been apprehended and have implicated several juveniles under the age of 17 years. It is your desire to fingerprint these juveniles for the purpose of comparing their fingerprints with latent fingerprints acquired at the scene of the burglary. It is my further understanding that the juveniles in question are not now or have not been in the past in the custody of the Orlando police department or the juvenile court with reference to these specific burglaries. Attached to your request is a copy of a form which the police department wishes to use for the purpose of securing the consent of the parents or guardians of the juveniles whom you wish to fingerprint. This form states essentially that the parent or guardian gives permission to the police department to fingerprint the named child for the purpose of comparing certain fingerprints on file in the police department with these fingerprints to determine his or her connection with certain pending cases, which are being investigated by the police department. The form further states that if the fingerprints do not compare with the latent fingerprints on file, the fingerprint card will immediately be destroyed and no copies thereof will be filed with any other law enforcement agency. If the fingerprints of the child in question do compare with the latent fingerprints on file in the police department, the fingerprint card will be immediately forwarded to the Orange county juvenile court for any action it may wish to take, and no copies thereof will be kept by the police department. The form contains a place for the name of the juvenile in question, his age, name of his parent or guardian and a place for the signature of the parent or guardian and for the signature of two witnesses to the signing of the said consent form.

Section 39.03(6), F. S., reads as follows:

> *No* child *taken into custody* shall be fingerprinted or photographed *except* by special order of the juvenile court judge, and no original nor any copy of any so taken shall be filed or

> recorded in any place other than the juvenile court, but all originals and copies thereof shall be delivered over to the juvenile court at the time directed in the order and promptly destroyed; provided, that this shall not apply to the photographing of children at any industrial school. Any record of the child made by any law enforcement officer or other person except the officers and employees of the juvenile court shall be made in a separate record kept *for that purpose, identifying the child only* by the initials and juvenile court case number of the child; *shall not be a public record;* and shall not be open to inspection by anyone other than the officers and employees of the juvenile court and by the child, the parents or legal custodians of the child, and their attorneys; provided however, that the records of child traffic violations shall be kept in the full name of the violator and shall be open to inspection and publication in the same manner as adult traffic violations. (Emphasis supplied.)

As can be readily seen from a reading of this section of Florida law, if a child is taken into custody pursuant to the provisions of §39.03, F. S., he cannot under any circumstances be fingerprinted by the law enforcement agency which takes the said child into custody without an express special order of the juvenile court judge. Furthermore, if the said child is fingerprinted under these circumstances, the original and any copies made of said fingerprints must be filed only with the juvenile courts. This section specifically refers to a child who is in the custody of the juvenile court at the time he or she is to be fingerprinted.

It is my opinion that the jurisdiction of the juvenile court does not attach to a child until the said child is taken into custody or a petition pursuant to the provisions of §39.05, F. S., is filed in the juvenile court with reference to a specific child. Since it is my understanding that you are referring to persons under the age of 17 years who are not in custody at the time that they would be fingerprinted, it is my opinion that the prohibition against fingerprinting contained in §39.03, F. S., would not be applicable to the circumstances here in question. If the form you wish to use is voluntarily signed by the parent or guardian of the child in question, that is, the person who would exercise immediate control and supervision over the said child, then it is my opinion that the fingerprinting of the said child would not violate the provisions of Ch. 39, F. S.

In conclusion, I feel it necessary to point out that under no circumstances should these fingerprints be used for any purpose other than comparing the child's fingerprints to the latent fingerprints on file in the police department, when the child is not in the custody of a juvenile court, and thereafter the said fingerprint card should be immediately destroyed or, if further proceedings are necessary, referred to the Orange county juvenile court.

The legislature, by the enactment of Ch. 39, F. S., has evidenced its intent not to allow the fingerprints of a child under the age of 17 years to be used to make any type of permanent record with reference to the said child. Under the doctrine of *parens patriae* the state is authorized to legislate for the protection, care, custody and maintenance of children within its jurisdiction. Pursuant to this doctrine, the legislature has evidenced its intent with reference to the fingerprinting of children and the use to which the fingerprints of a child under the age of 17 years can be put if they are made. In order to best carry out this legislative intent and to protect the young people of this state, I would advise that you proceed with utmost caution with reference to this matter.

066-3—January 18, 1966

COUNTY SCHOOL BUILDINGS

FRANKLIN COUNTY—RACE TRACK FUNDS—CHS. 65-684 AND 65-1564, LAWS OF FLORIDA

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Is the board of public instruction of Franklin county required to issue revenue certificates and to build such consolidated school. Under provisions of Chs. 65-684 and 65-1564, Special Acts relating to distribution of race track funds and the issuance of revenue certificates for the construction of a comprehensive consolidated high school in Franklin county, the latter act having been approved by a majority of the qualified electors of Franklin county voting in a referendum duly held as provided therein?

The provisions of Ch. 65-684 pertinent to your question are:

Race track funds payable to Franklin county under the provisions of chapter 550, Florida Statutes, shall be allocated as follows:

. . .

(3) The next seventy thousand dollars ($70,000.00) shall be allocated to the county board of public instruction for the purpose of issuing certificates of indebtedness and the proceeds of the same to be used in constructing a centrally located, comprehensive, consolidated high school in the county.

. . .

Section 2. If house bill No. 1968 (chapter 65-1564) . . . is approved by a majority of qualified electors voting in a referendum election to be held in Franklin county on or before November 2, 1965, and the certificates of indebtedness, as provided for in subsection (3) of section 1 of this act, are not issued within six (6) months after the date of such referendum election by the county board of public instruction for the purposes of constructing a centrally located high school in the county . . . all funds allocated under said subsection shall revert to the board of county commissioners and the county board of public instruction; . . .

Pertinent to your question, Ch. 65-1564 provides:

Section 1. The Franklin county board of public instruction . . . is hereby authorized to acquire, build, construct, erect, furnish and equip a comprehensive, consolidated junior-senior high school, including auditorium, gymnasium, cafeteria and storage, maintenance and administrative buildings, to be located on the easterly side and in the vicinity of Eastpoint on the most feasible site available.

Section 2. To pay the cost of such projects . . . the board is authorized to issue not exceeding one million dollars ($1,000,000.00) in bonds or certificates of indebtedness . . .

. . .

Section 8. This act shall take effect only upon its approval by a majority of the qualified electors voting in a

referendum election to be held in Franklin county on or before November 2, 1965.

It should be noted that under Ch. 65-1564 the Franklin county board is "*authorized* to acquire, build, construct, erect," etc., and that it is "authorized" to raise the necessary funds for such a project by issuing bonds or certificates of indebtedness. (Emphasis supplied.)

Attention is also invited to the provision, in §2 of Ch. 65-684, that if "the certificates of indebtedness, as provided in subsection (3) of section 1 of this act, are not issued within six (6) months after the date of such referendum . . . all funds allocated under said subsection shall revert to the board of county commissioners . . ."

I am of the opinion that such language clearly indicates a legislative intent that the issuance of the revenue certificates and the building of the consolidated junior-senior high school was to be permissive rather than mandatory.

Section 236.41, F. S., provides, in part:

> If it shall appear by the result of *said election* that a majority of the votes cast shall be *'for bonds,'* the county board shall be authorized and required to issue the bonds authorized by said election for the purposes specified in the resolution as published . . . (Emphasis supplied.)

However, the words "said election" refer to that election for which provisions are made in §236.39, F. S. This, in turn, is dependent upon whether or not the county board adopts and transmits such a resolution as is provided for in §236.37, F. S.

The project with which we are here concerned came into being under an entirely different procedure and was based upon circumstances somewhat different from those outlined in Ch. 236, F. S., and contemplated in §236.41, F. S. The referendum in the instant case was conducted for the purpose of ratifying an act of the legislature, and was not the result of a resolution adopted and transmitted to the state superintendent as provided in §236.37, F. S. I am therefore of the opinion that the provisions of §236.41, F. S., are not applicable to the situation with which we are here concerned.

From the foregoing, your question must be answered in the negative.

066-4—January 25, 1966

COUNTY SCHOOL SYSTEM

INSTRUCTIONAL PERSONNEL—AWARD OF ANNUAL CONTRACT AFTER VOLUNTARY RESIGNATION OF TEACHER FROM CONTINUING CONTRACT

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Could the county board accept a teacher's resignation from his continuing contract and then reappoint him to an annual contract with pay allowed for those days during which the teacher was under suspension?

2. Would this teacher be eligible for a continuing contract at the beginning of the 1966-67 school year if he meets all requirements of law for such contract?

In your letter you give the following factual explanation of the circumstances related to the questions:

> On November 22, 1965, a teacher on continuing contract was suspended from his teaching duties by the county superintendent for ten days as provided in section 230.33(7)(h), Florida Statutes. On December 2, 1965, the county board in special session voted to uphold the suspension and to continue the suspension *until a public hearing could be held and a final disposition of the case made.* Subsequent to December 2, the teacher while under suspension resigned from his continuing contract. The county board in formal session accepted the teacher's resignation. Subsequently, the principal and county superintendent recommended to the county board that the teacher be appointed on an annual contract. The county board acting on the recommendation of the county superintendent appointed the teacher to annual contract status. (Emphasis supplied.)

Section 230.33(7)(h), F. S., relating to the suspension of teachers, provides:

> *Suspension and dismissal.*—Suspend members of the instructional staff and other school employees during emergencies for a period of not to exceed ten school days, notify the county board immediately of such suspension, and, when authorized to do so, serve notice on the suspended member of the instructional staff of the charges made against him and of the date of hearing; recommend employees for dismissal under the terms prescribed herein.

Section 230.23(5)(h), F. S., provides:

> *Suspension and dismissal and return to annual contract status.*—Suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; provided, that no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed or returned to annual contract except as provided in chapter 231.

Section 231.351, F. S., provides, in part:

> *Annual contracts under certain conditions.—Any teacher who is otherwise entitled to receive a continuing contract under §231.36, may in the alternative be retained on an annual basis if the county board of public instruction of the particular county upon the recommendation of the county superintendent shall by majority vote find that such teacher does not meet the desired standards.* Among the criteria to be considered shall be educational qualifications, efficiency, capability, character and capacity to meet the educational requirements of the community. *A recommendation to grant such annual contract shall be made by the county superintendent of public instruction and shall be submitted on or before April 1 of the school year, giving good and sufficient reasons for such recommendation . . .* (Emphasis supplied.)

Section 231.36, F. S., provides, in part:

> *Contracts with instructional staff and with professional administrative assistants.*— . . . Each member of the instructional and administrative staff in each county school system, except in counties operating under local, special or general tenure laws with stated population application, who holds a regular certificate based at least on graduation from a standard four year

college, or as otherwise provided by law, who has completed three years of probationary service in the same county of the state during a period not in excess of five successive years; such service being continuous except for leave duly authorized and granted, who has been reappointed for the fourth year, and, who has met the requirements of §231.16(2), relating to comprehensive examination and score thereon, shall be entitled to and shall be issued a continuing contract in such form as may be prescribed by regulations of the state board; . . . Each person to whom a continuing contract has been issued as provided herein shall be entitled to continue in his position or in a similar position in the county at the salary schedule authorized by the county board without the necessity for annual nomination or reappointment until such time as the position is discontinued, the person resigns or his contractual status is changed as prescribed below:

(1) Any member of the county administrative or supervisory staff and any member of the instructional staff, including any principal, who is under continuing contract, may be dismissed or may be returned to annual contract status for another three years in the discretion of the county board, when a recommendation to that effect is submitted in writing to the county board on or before April 1 of any school year, giving good and sufficient reasons therefor, by the county superintendent, or by the principal if his contract is not under consideration or by a majority of the county board. The employee whose contract is under consideration shall be duly notified in writing by the party or parties preferring the charges at least five days prior to the filing of the written recommendation with the county board, and such notice shall include a copy of the charges and the recommendation to the county board. If the employee upon being officially notified in writing by the county board that it will consider the charges filed against him wishes a public hearing, he shall notify the board in writing within ten days after the date of the official notice. Upon receiving such a request, the county board shall within ten days notify the teacher of the time and place of the public hearing. In the event the teacher does not request a public hearing, the county board shall proceed to take appropriate action. Any decision adverse to the employee shall be made by a majority vote of the full membership of the county board . . .

AS TO QUESTION 1:

It would appear from the facts related in your letter that the teacher was still under contract during the period of suspension until the date of resignation which is not disclosed except that the resignation took place subsequent to Dec. 2. The facts indicate that at no time was the teacher dismissed for cause or a public hearing held on specific charges made against the teacher at which hearing the teacher could have been afforded an opportunity to present his defense as required by the statutes and the constitutional requirements of due process.

It would clearly appear therefore, that the teacher is entitled to his pay during the period of his suspension.

If the teacher voluntarily and without intimidation, coercion or undue influence of any nature is willing to waive his statutory rights to a public hearing on charges made against him and resigns his position thereby surrendering his continuing contract, it is my opinion that this

course of action would be his personal right and privilege. If, however, the teacher was coerced in any manner, directly or indirectly, by any school official and such coercion or intimidation resulted in his resignation, it is my opinion that under the statutes cited above, the teacher regardless of his resignation, would have a legal right to continue in his continuing contract status until such time as charges are made against him sufficient to warrant his dismissal or return to annual contract status and such charges proved at a public hearing as the law requires if the teacher so desires.

AS TO QUESTION 2:

If the teacher in question resigned voluntarily and the termination of his employment resulted solely because of his personal preference in the absence of any coercion, duress or undue influence, direct or indirect, your question is answered in the negative since the law (§231.36, F. S.) provides that resignation terminates the continuing contract.

If the resignation was not completely voluntary on the part of the teacher, your question is answered by my comments in response to question 1.

066-5—January 19, 1966

COUNTY SCHOOL SYSTEM

TRANSFERRING RECORDS OF STUDENTS OF PUBLIC AND NONPUBLIC SCHOOLS

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May a county board of public instruction direct schools under its jurisdiction to withhold transfer of a student's records for failure to pay for lost, destroyed, or damaged textbooks, library books and other school materials, and until all duly prescribed laboratory, workbook and other fees are paid?

2. May a nonpublic school legally refuse to transfer a student's records for the same or similar reason?

Accreditation standards for Florida schools, 1963, which is applicable to "nonpublic" schools holding certificates of approval under provisions of Ch. 247, F. S., as well as to public schools, provides, in section 5.653(3)(c):

> Whenever a student transfers to a new school, his accumulative record or a complete copy thereof shall be forwarded upon request to the new school.

Section 232.23, F. S., as amended 1965, provides:

> The procedure for transferring and maintaining records of children who transfer from school to school shall be prescribed by regulation of the state board.

Section 229.051(1) and (2), F. S., provides:

> *General powers of state board.*—The state board shall exercise the following general powers:
>
> (1) DETERMINE POLICIES.—The state board shall determine and adopt such policies as are required by law and as in the opinion of the state board are necessary for the more efficient operation of any phase of public education.

(2) ADOPT RULES AND REGULATIONS.—The state board shall adopt and prescribe all needful rules and regulations for the proper enforcement and carrying out of the provisions of the school code.

Section 233.47, F. S., provides, *inter alia:*

> All books . . . distributed to the pupils as provided for in this chapter . . . shall be merely loaned to the pupils . . . and are to be returned at the direction of the principal or teacher in charge. Each parent, guardian, or other person having charge of . . . pupils to whom . . . books have been issued shall be held liable for any loss, destruction, unnecessary damage, or failure of such pupil or pupils to return such books when directed . . . and shall be required to pay for such loss, destruction, or unnecessary damage . . .

There is apparently no similar law or regulation pertaining specifically to liability for and collection of laboratory fees or other school fees.

Notwithstanding the provisions of §233.47, F. S., however, I find nothing in any of the above-quoted laws and regulations that would authorize a county board of public instruction to establish any rule, policy or regulation under which payment of the charges or fees or return of all books and materials mentioned in your questions is required as a prerequisite to the transfer of a student's academic records.

However, under provisions of §229.051(1) and (2), F. S., I am of the opinion that the state board of education, as part of its mandate to prescribe the "procedure for transferring" such records under §232.23, F. S., may, by regulation based upon reasonable standards, establish rules for the guidance of "the principal or teacher in charge" in such cases.

I am further of the opinion that there is nothing in the law to prevent any "nonpublic" or private school from promulgating such reasonable rules and regulations pertaining to the transfer of its students' records as to its duly constituted administrative officers might seem fit and proper.

Question 2 is answered in the affirmative.

066-6—February 7, 1966

TAXATION

REFUNDS OF TRAILER LICENSE AND AD VALOREM TAXES PAID FOR 1965

To: Arch Livingston, Director, Department of Motor Vehicles, Tallahassee

QUESTION:

> **Where mobile homes, trailer coaches, etc., were licensed under §320.081, F. S., for the license tax years beginning Jan. 1, 1964 and Feb. 1, 1965, but were nevertheless subjected to ad valorem taxes for the tax years of 1964 and 1965, should any of such taxes, ad valorem or license, be refunded upon the application of the taxpayer?**

The Florida legislature, by Ch. 23969, 1947, which was amended by Ch. 63-528, declared trailers and mobile homes, used for housing purposes, motor vehicles, which laws were codified as §320.081, F. S. However, upon litigation arising in St. Johns county, the Sup. Ct. of Fla., held said §§320.081 and 200.45, F. S., which appear to have been sup-

plemental to said §320.081, F. S., which sections treated such trailer coaches and mobile homes and similar vehicles as motor vehicles, within §13, Art. IX, State Const. (prior to its 1965 amendment) to have been violative of said §13, Art. IX, State Const. (Palethorpe v. Thomson, Fla., 171 So.2d 526). In this case the Sup. Ct., notwithstanding said §§200.45 and 320.081, F. S., held that such trailers were subject to ad valorem taxation as tangible personal property. In the light of this Sup. Ct. opinion such trailers were subjected to ad valorem taxation as tangible personal property in most of the several counties of the state. In the light of the Sup. Ct. opinion in this case the said trailers were in fact subject to ad valorem taxes notwithstanding said §§200.45 and 320.081, F. S., and it might have been within the authority of the tax assessors to have back assessed them. This question does not appear to have ever been raised.

Motor vehicle (trailer) license tags were sold throughout the state under said §§200.45 and 320.081, F. S., for the tax years of 1964 and 1965, at least until the time the Sup. Ct. opinion in the above case became final (Mar. 5, 1965). Tags for the year 1964 went on sale around Jan. 1, 1964, and for 1965, around Feb. 1, 1965, and ran for a period of 13 months therefrom. Such trailer licenses were in the amount of $10 per year, which license fees or taxes were payable into the state treasury to the account of the general revenue fund. (§320.20, F. S.) When these funds are paid into the state treasury they become subject to §4, Art. IX, State Const., which section provides that: "No money shall be drawn from the Treasury except in pursuance of appropriations made by law." Tax funds (license, ad valorem, excise, etc.) when paid into the state treasury may not be refunded unless there be statutory authority for such a refund. See also 53 C.J.S. 696, et seq., §57 (refunding license taxes) and 84 C.J.S. 1263, et seq., §631 (refunding tax funds generally). Although a tax may be void, after it has been paid into the state treasury it may be refunded only in case the state statutes authorize its refund and then only in conformity with such statute.

Most tax assessors in the several counties of the state, because of said §320.081, F. S., and the provision therein that the said "license tax shall be in lieu of all other taxes," did not impose ad valorem taxes thereon until after the filing of the court's opinion in Palethorpe v. Thomson, Fla., 171 So.2d 526. So far as we are advised there was no attempt by any of the tax assessors to back assess any of the said trailers for years prior to 1965. The assessments made in St. Johns county for 1964 involved in Palethorpe v. Thomson, *supra*, were not back assessments but were original assessments for said 1964. We do not think that any license taxes collected under said §320.081, F. S., for the tax years of 1964 or 1965 should be deemed illegal payments of a license tax or of an ad valorem tax, unless the trailer in question was assessed for both a license tax and an ad valorem tax for the same year. Where both a license tax and an ad valorem tax were collected on a trailer, within the purview of §320.081, F. S., for said 1965, it would appear that the license tax was illegal, but in such case the ad valorem tax would be valid.

Section 193.40, F. S., makes provision for the refund of "taxes assessed on the county tax rolls" by reason of an overpayment, a payment when no tax is due, and in case of litigation in which the tax is held invalid in whole or in part. Only ad valorem taxes on real and tangible personal property are assessed on the county tax roll. This provision for a tax refund does not apply to license taxes. Section 215.26, F. S., makes provision for the refund of an overpayment of a tax, license or

account due, or a payment when no tax, license or account is due, and payments of moneys into the state treasury in error. This section relates to state and not county taxes, licenses and accounts due. Pro rata refunds of motor vehicle taxes (which would seem to be applicable to trailer licenses imposed by Ch. 65-446 (§320.01, F. S.), insofar as it levies a state license tax on trailers as described therein, are authorized in those cases where "a motor vehicle has been destroyed or permanently removed from the state," as is provided by §320.15, F. S. This section relates only to licensed motor vehicles and trailers which have been destroyed or permanently removed from the state.

License taxes for the tax year 1965 were due and payable on Feb. 1, 1965, and were for 13 months from said date, thereby expiring on Mar. 1, 1966. Under the court's opinion in Palethorpe v. Thomson, *supra*, the license taxes imposed by §320.081, F. S., were invalid as applied to the trailers when used for housing purposes, and the said vehicles were subject to ad valorem taxation for the year beginning Feb. 1, 1965, so that no license taxes were due and payable thereon under said §320.081, F. S., for the license period beginning on Feb. 1, 1965, and would appear to be refundable under §215.26, F. S., provided, however, that ad valorem taxes were assessed on the said trailer for the tax year of 1965 by the county assessor of taxes. Such license taxes should not be refunded in those cases where no ad valorem taxes were imposed on such trailers for the tax year of 1965, unless and until such taxes have been levied for said year.

The Florida Statutes make no provision for the refund of a license tax for a part of a year, except as to motor vehicles which have been destroyed or permanently removed from the state, and refunds may be made from the state treasury (See §4, Art. IX, State Const.); tax funds paid under §320.081, F. S., are paid into the state treasury and are within the purview of said §4, Art. IX, State Const.

The revolving account maintained by the motor vehicle department was designed to provide a means for administering checks in excess of the license tax due, or other overpayments, so that only the amount due will be paid into the state treasury.

We, therefore, hold that:

1. The statutes do not provide for pro rata refunds of motor vehicle (including trailer) taxes paid under and pursuant to §320.081, F. S.

2. License taxes paid under said §320.081, F. S., for that period of time beginning Feb. 1, 1965, and ending Mar. 1, 1966, when ad valorem taxes were imposed against the trailer for 1965, would, because of the imposition of the ad valorem taxes, constitute the payment of a tax when no tax was due, within §215.26, F. S., and a refund of such taxes may be made when said §215.26, F. S., has been complied with.

3. Such license tax refunds should not be made in those cases where no ad valorem taxes were assessed for said tax year of 1965, unless such taxes be yet paid or imposed thereon.

066-7—February 7, 1966

TAXATION

MOBILE HOMES, HOUSE TRAILERS, ETC., USED FOR HOUSING ACCOMMODATIONS—EFFECT OF 1965 AMENDMENTS OF §13, ART. IX, STATE CONST., AND §320.081, F. S., UPON §200.45, F. S.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. What effect did the 1965 amendment of §13, Art. IX, State Const., as implemented by Ch. 65-446, have upon §200.45, F. S.?

2. May mobile home owners living in their mobile homes, by refusing to pay the license tax imposed by §320.081, F. S., as amended by §2, Ch. 65-446, make such mobile homes subject to taxation as tangible personal property under §200.45, F. S.?

The Sup. Ct. of Fla., in Palethorpe v. Thomson, Fla., 171 So.2d 526, held that mobile homes, house trailers, and other types of trailers used primarily for housing, and not transportation purposes, were not motor vehicles within the purview of §13, Art. IX, State Const., and were subject to ad valorem taxation as tangible personal property under Ch. 200, F. S., notwithstanding their owners may have purchased and had attached to such mobile home or trailer license tag in accordance with §§200.45 and 320.081, F. S., holding said sections invalid insofar as they purported to grant ad valorem tax exemption for such mobile homes and trailers for which license tags had been purchased under said §200.45, F. S.

The 1965 regular session of the Florida legislature, by S.J.R. 751, submitted to the electors of the state, to be voted on at the general election in 1965, an amendment of §13, Art. IX, State Const., which declared mobile homes, trailer coaches, house trailers, and other trailers used primarily for housing and residential purposes, to have, in Florida, a status similar to "motor vehicles," under said §13, Art. IX, State Const., and subject to only one form of taxation, that is, a license tax, the same to be in lieu of all ad valorem taxes that may have been previously assessed against such mobile homes and trailers used for housing purposes. This amendment of said §13, Art. IX, State Const., extends to and "includes mobile homes, trailer coaches, house trailers, camper type mobile homes . . . used for housing accommodations." Provided, however, that should such mobile home, trailer coach, house trailer, etc., become part and parcel of the owner's homestead, within the purview and intention of §7, Art. X, State Const., it may claim the tax exemption permitted by said §7, Art. X, State Const.

Section 320.081, F. S., appears to have originated as Ch. 23969, 1947, and was amended by Ch. 63-528, appearing as amended as said §320.081, F. S., 1963. Section 200.45, F. S., appears to have originated as Ch. 24113, 1947, with the second subsection thereof having been amended by §1, Ch. 61-460. When said §§200.45 and 320.081, F. S., are read and construed together in the light of their histories, it is quite evident that §200.45, F. S., was primarily intended as an enforcement procedure for §320.081, F. S., prior to its 1965 amendment. The statutes set up an exemption from ad valorem taxation for those trailers for

which a license had been purchased under §320.081, F. S., which exemption was held invalid in Palethorpe v. Thomson, *supra.*

Section 13, Art. IX, State Const., prior to its 1965 amendment, provided that: "Motor vehicles, as property, shall be subject to only one form of taxation which shall be a license tax . . . (which) shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property." The 1965 amendment of said §13, Art. IX, State Const., defined the term "motor vehicles," as used in the section as amended, as including "mobile homes, trailer coaches, house trailers, camper type mobile homes . . . designed for and used either as a means of transporting persons or property over the public streets and highways of this state or for furnishing housing accommodations, or both . . ." Trailers within this definition, like automobiles and other motor vehicles, are not subject to ad valorem taxes, whether or not the license tax provided for in the statutes has been paid or not. The mere failure of an owner of an automobile or motor truck to purchase a license therefor as required by law does not make that automobile or motor truck liable for ad valorem taxation.

License taxes are imposed on mobile homes, trailer coaches, house trailers, campers and other vehicles not self-propelled and used for housing accommodations, under the classifications and in the amounts provided for in §320.081, F. S., as amended by §2, Ch. 65-446. Section 320.19, F. S., provides that:

> The registration tax required under this chapter when not paid, shall constitute a first lien upon the motor vehicles against which the same is chargeable, which lien shall be superior to all other liens upon such motor vehicle, and may be enforced and collected, if delinquent more than thirty days, by levy and sale in the same manner as under execution of law on the amount of the tax due, which enforcement may be under a tax warrant issued for that purpose by the director of the department of motor vehicles and enforced in like manner as is provided by law for the enforcement of tax warrants by the comptroller.

See also §205.10, F. S., which authorizes the issuance of tax warrants for the collection of delinquent license taxes by the several tax collectors, the comptroller, the state treasurer and other officials charged with the collection of license taxes.

The above-stated questions are answered as follows:

1. The 1965 amendment of §13, Art. IX, State Const., and its implementing act, Ch. 65-446, abolished, beginning with the tax year of 1966, ad valorem taxes against mobile homes, trailer coaches, house trailers, campers and other vehicles used for housing accommodations. This abolition of ad valorem taxes against such mobile homes, trailer coaches, house trailers, campers, etc., is not, by said constitutional amendment, made dependent upon the purchase of a license tag under §320.081, F. S., as amended by §2, Ch. 65-446. To all intents and purposes, §200.45, F. S., was repealed insofar as it was and is, by its terms, made applicable to mobile homes, trailer coaches, house trailers, campers, etc., as contemplated by the 1965 amendment of §13, Art. IX, State Const.

2. Question 2 is answered in the negative. In case the required license tag is not obtained by an owner of a mobile home, trailer coach, house trailer, camper, etc., as provided for in §13, Art. IX, State Const., and its implementing act, Ch. 65-446, and remains delinquent for a period of 30 days, the official having knowledge of such delinquency should advise the director of the department of motor vehicles who should, under

§320.19, F. S., issue a tax warrant for the collection of such delinquent license tax. The procedures for enforcing the tax warrant may be as set out in §205.10, F. S.

066-8—February 17, 1966

STATE OFFICERS AND EMPLOYEES

COMPENSATION—CONSTRUCTION OF §282.051(6), F. S.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

> **1. When do the provisions of §282.051(6), F. S., 1965, preclude payment of compensation by a state agency or board to an individual currently filling another position with the state and receiving a salary or compensation therefrom?**
>
> **2. Would the provisions of §282.051(6), F. S., 1965, preclude payment of compensation by a state agency or board to a partnership or firm where a member of said partnership or firm is currently filling another position with the state and receiving a salary or compensation therefrom?**

AS TO QUESTION 1:

The answer to question 1, depends upon whether the state agency is employing and compensating an individual who is currently filling or performing the duties of a position "the salary of which has been *specifically* fixed or limited by law." (Emphasis supplied.) The foregoing terminology is contained in §282.051(6), F. S., as amended by Ch. 65-367, as follows:

> The provisions of subsection (3)(e) of this section shall not apply to an individual filling a position, *the salary of which has been specifically fixed, or limited, by law.* Unless specifically authorized by law, an individual filling or performing duties of a position, the salary of which has been specifically fixed, or limited, by law, shall not receive compensation from more than one appropriation, nor in excess of the amount so fixed, or limited, by law, regardless of any additional duties performed by him in any capacity or position. (Emphasis supplied.)

Section 282.051(3)(e), F. S., as amended, provides:

> No person employed by the state may fill more than a total of one full-time equivalent established position, or receive compensation simultaneously from any appropriation other than appropriations for salaries, or receive compensation simultaneously from more than one state agency unless approved by the budget commission during each biennium. *The provisions of this paragraph shall not apply in those instances covered by the provisions of subsection (6) of this section.* (Emphasis supplied.)

Subsection (6) restricts the application of subsection (3)(e) and prohibits budget commission approval of compensation from more than one appropriation in those instances where an individual is filling a position "the salary of which has been *specifically* fixed or limited by law." In addition, subsection (6) prohibits an individual whose salary is *specifically* fixed or limited by law from receiving any amount in excess of the amount so fixed or limited by law. (Emphasis supplied.)

The word "law" as used in subsection (6) includes but is not limited to "a statute adopted by both houses of the legislature" (See Advisory Opinion to the governor, 22 So.2d 398). The word "law" in the context of the said subsection also includes constitutional provisions specifically fixing or limiting salaries or compensation of state officers.

The word "specifically" is synonymous with "explicitly," "particularly," "definitely" and "precisely" (39 Words and Phrases 402; see also AGO 065-117, Oct. 13, 1965).

Illustrations of instances where salaries have been specifically fixed by law are as follows: (1) A constitutional provision such as §4, Art. III, providing that ". . . the compensation of legislators shall be $1200 each year and shall be paid in monthly installments of $100 each . . ." (salaries of legislators are also specifically fixed by §11.13(1), F. S.) (2) A line item in the appropriations act as set forth in Ch. 65-135 (§282.01(1), F. S.), to wit: "41a. Salary of Attorney General (see §29, Art. IV) . . . $24,000" (3) A statutory provision (not contained in the general appropriations act) such as §334.09(1), F. S., fixing the salary of all members of the road board except the chairman as follows: ". . . all . . . members shall receive an annual salary of six thousand dollars."

Salaries thus fixed in this "specific" or "precise" manner are fixed without reference to any other document such as an agency's legislative budget or similar report (See AGO 065-84, Aug. 5, 1965). Moreover, the foregoing illustrations are intended to point up the legislature's intent to distinguish between those instances where salaries have been "specifically fixed or limited by law" and instances where salaries of state officers and employees have been generally fixed by law in a lump sum, for example: (§282.01(1), F. S.), item (1) (b) of Ch. 65-135, which provides as follows:

	1965-66	*1966-67*
Salaries of 1324 positions	$5,726,255	$5,918,088

Salaries of most state employees and other personnel are fixed in this general manner. While these salaries are fixed by law, such salaries are not "specifically fixed or limited" by express provision of the appropriations act, constitution, general laws or statutes as indicated in the above illustrations. An individual whose salary is fixed generally in a lump sum item could be employed by another state agency under §282.051(3)(e), F. S., and receive compensation from more than one appropriation or from more than one state agency with budget commission approval; and budget commission approval would not be prohibited under §282.051(6), F. S., because this individual's salary is not specifically fixed or limited by law as illustrated earlier in this opinion. (A similar conclusion was reached in AGO 065-117, *supra.*)

However, where a state position as defined in §282.021(18), F. S., is filled by an individual (for example, a member of the Florida legislature) whose compensation is specifically fixed by the constitution and statutes, and who is employed and compensated by another state officer, board, commission or agency to perform some service, the provisions of subsection (6) would appear to be applicable. Thus, a legislator would be precluded from receiving compensation from another state appropriation or compensation in excess of the amount fixed by the constitution and statute, *supra*, "regardless of any additional duties performed by him in any capacity or position."

It is important to make the additional observation that subsection

(6) prohibits such aforementioned employment *"unless* specifically authorized by law" (see subsection (6), *supra*). (For an illustration of an instance where the legislature has specifically authorized dual compensation, see AGO 065-84, *supra*, interpreting §491.03(4), F. S.)

One more point that needs brief comment is that in discussing statutes relating to appropriations and the applicability of the spending philosophy act to certain situations, we must do so only in light of the particular moneys which are directly involved, to wit: "state funds," as distinguished from "federal funds" in the state treasury (See AGO 065-117, *supra*) and "county funds" in the custody of the state treasurer (See Amos v. Mathews, 126 So. 308).

By way of summary, the provisions of §282.051(6), F. S., would preclude a state agency from paying the salary of an individual whom it employs where such individual was also filling a position the salary of which has been specifically fixed by constitution, line item appropriation, statute or general law. The prohibition would not apply to those persons whose salaries are contained in lump sum salary appropriations or where the legislature has specifically authorized such an individual to hold more than one position and receive dual compensation. Moreover, the prohibition would not be applicable where federal or county funds may be involved or persons filling positions of the kind discussed in opinion 065-84, *supra*.

Question 1 is, therefore, answered accordingly.

AS TO QUESTION 2:

Implicit in question 2 is whether §282.051(6), F. S., prohibits both direct and indirect payment of dual compensation to individuals filling a position the salary of which has been specifically fixed or limited by law. In order to determine whether it is reasonable to conclude that indirect payments are prohibited under the facts posed by question 2, it will be necessary to inquire into the nature and purpose of a partnership.

A partnership is usually defined as a voluntary contract between two or more competent persons to place their money, effects, labor, and skill or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. (24 Fla. Jur., §2, pp. 322 & 323; F. J. Dubos & Co. v. Hoover, Jones and Bowden (1889), 25 Fla. 720, 6 So. 788.)

It is stated in 68 C.J.S., partnerships, §17A p. 427:

> An agreement to share profits, although not necessarily express, is an *essential* element of the partnership relationship, and, at least as between the parties themselves, there must be a community of interest, or right to participate, in the profits of the business or venture before it can be said that an agreement of partnership has been entered into and exists. The absence of a mutual interest in the profits is conclusive that a partnership does not exist, and an agreement to share the losses or expenses of an undertaking without an agreement, express or implied, to share the profits does not create a partnership. . . (Emphasis supplied.)
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> * * * * *
>
> In conformity with this requisite of partnership, a test often applied to determine the existence of the relationship is whether the supposed partner acquired by his agreement or arrangement any control, as owner, over the profits while they remained undivided, that is to say, if the supposed partner has an interest in the undivided profits, as profits,

> it would indicate that he was a partner, while, on the other hand, if the arrangement in respect of the profits was simply for the purpose of determining the fund from which, or the amount to which, the supposed partner would be entitled as compensation for services, money advanced, or other benefits conferred, it would indicate that no partnership was intended or created. (See 24 Fla. Jur., pp. 337, 338 & 341; Uhrig v. Redding (1942), 150 Fla. 480, 8 So.2d 4; Dubos v. Hoover, *supra.*)

There is no exclusive test or general rule which will determine the question of partnership in every case. Text authorities point out that the question of existence or nonexistence of a partnership is often of difficult solution. The courts have frequently applied different tests to ascertain whether a given set of facts constitute a partnership. Moreover, whether a sharing in the partnership profits exists to the extent that such partnership falls within the contemplation of §282.051(6), F. S., necessarily depends upon the facts of each case.

However, in view of the definition and nature of a partnership as generally outlined above by the text and case authorities, we are inclined to believe that §282.051(6), F. S., is applicable to the individual members of partnerships. In other words, in dealing with the partnership, a state agency in reality is dealing with the individual member since each shares in the profits. Payments to a partnership as discussed above, would therefore be prohibited under subsection (6) where an individual member of the partnership is also filling a position the salary of which has been specifically fixed or limited by law.

We feel that it is essential to make an additional closing observation concerning §282.051(6), F. S. It is important that it be recognized that subsection (6) is not what is often referred to as a "conflict of interest" bill or "code of ethics" bill relating to the conduct of state officers, employees, legislators, etc. Bills of this type which have been introduced in past sessions of the legislature (See S. B. 101) are designed to establish standards of conduct for state officers, employees, legislators and legislative employees. We do not believe from the language of subsection (6) or any other sections contained in Ch. 282, F. S., that the legislature intended such provisions to be construed as a conflict of interest law. Instead, the legislature has merely evidenced its intention to control and limit the fiscal affairs of state government and in particular to provide limitations on appropriations and expenditures of state money.

It is important to observe that it is impossible to set forth a general rule of law applicable to all situations. It would equally be impossible to anticipate all factual situations. Conceivably, there could be instances where the particular facts and circumstances create an exception which would be well within the legislative contemplation of the interpretation of §282.051(3)(e) and (6), F. S.; for example, as discussed in opinion 065-84, *supra.*

Question 2 is answered in the affirmative.

066-9—February 7, 1966

TAXATION—COUNTY

FINANCING OF REASSESSMENT PROGRAM

To: Thomas C. Wilkinson, County Attorney, Jackson County, Marianna

QUESTIONS:

1. May a board of county commissioners place funds borrowed under Ch. 65-547 (§193.112, F. S.) in a special account to be administered by the tax assessor?

2. Would a board of county commissioners violate §125.08, F. S., if it allowed the tax assessor to obtain photographic maps as outlined in phase 1 or the remaining phases of his reassessment program without obtaining bids on a competitive basis?

AS TO QUESTION 1:

Section 193.112(1), F. S., 1965, authorizes the board of county commissioners to obtain a current loan to pay the expenses of a reassessment program and provide for the repayment of such loan from the proceeds of revenues reasonably to be anticipated during the fiscal year in which the loan is made or in the next succeeding fiscal years. Said section expressly designates the board of county commissioners as the proper governmental entity to negotiate loans of funds to be used for reassessment purposes. Subsection (2) of said section limits the authority of the board of county commissioners insofar as terms of such loan and a pledge of the credit of the county to increase additional millage for the repayment of such loan. Enacted as Ch. 65-547, the section is in implementation of the provisions of §193.111, F. S., and the mandate of the Fla. Sup. Ct. that real evaluation and reassessment be accomplished to provide the just "valuation" as required by §1, Art. IX, State Const., and §193.021, F. S. Walter v. Schuler, 176 So.2d 81.

The board of county commissioners is authorized to obtain funds for the reassessment program and unquestionably has the responsibility to provide for the repayment of loans for that purpose. It is my opinion that funds so obtained become county funds to be administered as other county funds and disbursed on county warrant upon preaudit by the clerk of the circuit court and approval of the board of county commissioners. (See §136.06, F. S., 1965)

Question 1 is therefore answered in the negative.

AS TO QUESTION 2:

The facts submitted with your inquiry indicate a contemplated expenditure for the preparation of photographic enlargements and basic map data to be used by the tax assessor in connection with the reassessment program. Apparently aerial photographs of the county are to be taken, developed, enlarged and presented to the tax assessor, upon which information pertinent to the assessment of property in the county will be noted. We note the expenditure contemplated for the above program is in excess of the limitations pertaining to competitive bids as appears in §125.08, F. S.

Such aerial photographic material should be classified as a service, thus not within the purview of competitive bid statutes applicable to county public works projects and the purchase of supplies and materials. Hence, no statutory requirement that bids be taken for such

services need be followed. However, the strong public policy of this state requires that even in the absence of controlling statutes, expenditures of public funds must be made on competitive bids whenever possible.

Question 2 is answered accordingly.

066-10—February 18, 1966

COUNTY PUBLIC SCHOOLS

LOCATION OF SCHOOL SITES—CITY ORDINANCES

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Are zoning ordinances of the city of Miami valid and effective insofar as the board of public instruction of Dade county is concerned in its location of school sites?

In AGO 065-81, I expressed the opinion, as had several of my predecessors in office, that generally speaking, the state is not subject to legislative enactments of a municipal corporation, and that, as expressed in AGO 058-119, a municipality has no "legal authority to interfere by ordinance *unless the city's charter specifically grants it such authority.*" (Emphasis supplied.)

There appears to be even more direct authority indicating that the same rule would apply with reference to a municipal zoning ordinance purporting to restrict a county board of public instruction in its selection of school sites. In Ch. 176, F. S., the legislature granted to municipalities the power to enact and administer zoning ordinances and regulations. Section 176.02, F. S., provides, among other things, that: "municipalities may . . . regulate and restrict . . . the location and use of buildings, structures, and land . . ." However, §176.02, F. S., further provides:

> Wherever the governing body of any municipality shall elect to exercise any of the powers granted to it under this chapter, said powers shall be exercised in the manner hereinafter prescribed and *in accordance with the charter of such municipality.* (Emphasis supplied.)

I am therefore of the opinion that unless the charter of the city of Miami specifically grants such authority, that city would have no authority to regulate or restrict the location of a school site duly selected by the board of public instruction of Dade county.

066-11—February 18, 1966

STATE OFFICERS AND EMPLOYEES

COMPENSATION OF MEMBERS AND EMPLOYEES OF FLORIDA COMMISSION FOR TAX REFORM

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

What rate of per diem and subsistence allowance should the members and employees of the Florida commission for tax reform be compensated?

The Florida commission for tax reform was created and established by Ch. 65-303, §4 of which provides that:

> The members of the commission shall serve as a public service without compensation but they and the employees of the commission shall be reimbursed in the performance of the functions of the commission in the manner prescribed by section 112.061, Florida Statutes . . .

Section 6 of said Ch. 65-303, appropriates from the state general revenue fund the sum of $50,000 for the administration and enforcement of the said act. Section 112.061(6), F. S., provides for the rates of per diem and subsistence allowances for state officers and employees, which subsection (6) is divided into out-of-state travel (§112.061(6)(a), F. S.) and in-state travel (§112.061(6)(b), F. S.). We are presuming here that commission meetings will be held within the state.

Said Ch. 65-303 (§282.011(10), F. S.), created and established a "Florida Commission for Tax Reform" to be composed of 15 members; 5 members of the Florida senate, to be appointed by the president of the senate; 5 members of the house of representatives, to be appointed by the speaker of the said house of representatives; and 5 members to be appointed by the governor, under and pursuant to §27, Art. III, State Const., and in accordance therewith. Vacancies are to be filled in the same manner as is provided for the original appointments. The 15 members of the commission elect 1 of their number as chairman.

The powers and authority of the commission are set out in §3 of said Ch. 65-303. Generally the purpose and intention of the legislature in creating and establishing this commission was to obtain a complete and exhaustive study of the tax structures of Florida, including state, county and municipal and other taxing authorities, and a survey thereof looking toward a better and more equitable taxing setup, and, when such survey has been completed and perfected and made final, to compile the same as a report, recommendation and proposal, to the governor, members of both houses of the legislature and the legislative council, the same to be completed and ready for delivery as aforesaid "not later than February 1, 1967."

Interim reports are required to be made to the governor when requested by him, or in the discretion of the commission. Provision is made in the act for the commission receiving records, information, data and assistance from state and local agencies and departments, including studies and reports from them. Provision is made in the act for the employment of an executive secretary and other needed assistance, and the holding of a public meeting from time to time. The commission is authorized to adopt necessary and needed rules and regulations concerning its organization and operations.

Among the duties of the commission is the making and publication of reports, recommendations and proposals, suggested from their operations, surveys, etc., hereunder, and to submit the same to the governor, the president of the senate, the speaker of the house of representatives and to the legislative council, which appears to have been intended as recommendations to the Florida legislature, including its senate and house of representatives and the legislative council, and suggestions for a tax reform study by the legislature, and a general overhauling, revision and perfection of the tax and taxing statutes and laws of Florida. This Florida tax reform commission is in the nature of an advisory body to the Florida legislature and its members, officers and agents. It is a governmental commission in the nature of a legislative committee,

set up to aid and assist the legislature in its consideration of taxation and tax reforms.

The membership of this commission consists of 10 ex officio members (members of the legislature) and 5 members appointed by the governor in conformity with §27, Art. III, State Const. They are all public officers of the state. No question of nonofficial members arises here. The members are all of official status under the State Const. The said commission also has a status as an interim legislative committee.

Section 112.061, F. S., in addition to travel expenses, makes provision for the payment of a per diem for state officers and employees when engaged in state business when away from their homes or official residences on official state business. Section 112.061(6), F. S., makes provision for both out-of-state travel (§112.061(6)(a), F. S.), and in-state travel (§112.061(6)(b), F. S.). For the present we will deal with only in-state travel. Such in-state travel is divided into 2 or more classes or groups. First, traveling to attend a convention or conference, which will serve a direct public purpose with relation to the public agency served by the person attending such convention or conference; second, public officers traveling on other official business; third, all other in-state travelers. No distinction is made as between officers and employees when traveling on official business to attend a convention or conference which will serve a direct purpose with relation to the public agency served by the person attending such meeting. The per diem pay rate is the same for both officials and employees; "up to twenty dollars per day." Public officers when traveling in-state on other official business, not to attend a convention or conference, (a) the governor, cabinet members and members of the legislature, when legislature is in session, $25 per diem and when the legislature is not in session, $20, and all other state officers, $16 per diem, and public employees as therein provided. This may be divided into travel to attend a convention or conference, general official travel of officers with variations between the governor, cabinet members, members of the legislature and other public state officers, and state employees.

Although the legislative members of the commission travel as ex officio members of the commission, the remaining members (5 in number) travel as public officers generally as members of the commission. This presents the problem of the compensation of the legislative members of the commission as well as the nonlegislative members. Generally, legislative members receive $20 per diem for travel when the legislature is not in session and public officers generally receive a per diem of $16. Presently we are dealing with the per diem of the officers only, not employees.

Only if it may be said that a meeting of the 15-member commission may be said to constitute a convention or conference may all members be paid a per diem of $20 when attending commission meetings. We doubt that the nonlegislative members of the commission may be classified as members of the legislature to permit a payment of $20 per diem under §112.061(6)(b)2., F. S., to the nonlegislative members. Their pay under this subparagraph is $16 per day. Although they are members of a legislative committee, not being members of the legislature, they may not be classified as such under the statute.

This brings us to the question of whether or not meetings of the members of the commission may be classified as a convention or a conference. It does not appear to be subject to classification as a convention; then may it be classified as a conference, within the purview of §112.061-(6)(b)1., F. S.? A "conference" is defined in Black's law dictionary as

"a meeting of several persons for deliberation, for exchange of opinion or for the removal of differences or disputes." To the same effect see also 15 C.J.S. 819, note 22. In State v. Clemmons, 153 C.A.2d 64, 314 P.2d 142, text 146, the California Dist. Ct. of App., 2nd Dist., held that a "round table conference" is a "meeting of a group for discussion, deliberation and discussion upon questions of mutual interest, a sort of debate, where no precedence in rank can be indicated, for the purpose of free discussion." A legislative conference committee consists of committees appointed by each house of a legislative body, when they are unable to agree on a pending measure, who meet together for the purpose of points of difference, discuss points of difference and harmonize conflicting views and arrange a compromise acceptable to both houses; see Black's law dictionary, 4th Ed. The Merriam Webster dictionary, 2d Ed., defines "conference" as the "act of consulting together formally; serious conversation or discussion; interchange of views . . ."

Although we find a statement in some of the authorities that a conference may consist of a "meeting for consultation, discussion or interchange of opinions, *whether of individuals or* groups," (Emphasis supplied.) we doubt that this statement refers to a meeting between 2 or even 3 or 4 individuals. Reference is often made to a meeting of a board of directors, not to a conference of a board of directors. We refer to a meeting of stockholders, not to a conference of stockholders, of a corporation. See also the definition of a "meeting" collected in 27 Words and Phrases, Perm. Ed., 3-6, and the definition of a "meeting" in Black's law dictionary; also in 57 C.J.S. 1044. In §112.061(6)(a)1., and (b)1., F. S., reference is made to attending "a convention or conference" which will serve a direct public purpose, etc., said words being used together and not with other terms of the same general nature. Under the rule of "noscitur a sociis" words associated with each other or connected with each other in a statute lend color to each other in their construction. This being true, the words "convention" and "conference," as used above, are words of comparative meaning. A convention is the gathering of a group of a political nature and is probably a word of more magnitude than a "meeting." A convention may be compared to a conference, and is a meeting for the interchange of ideas, or opinions, for the purpose of deliberation, and for the consideration and removal of differences, through discussion and otherwise.

The members of the commission when meeting as a body, not less than a majority of the commission (8 members) present and acting, would appear to constitute a "conference" within the purview and intention of §112.061(6)(b)1., F. S. The membership of this commission is fairly well-spread throughout the state, making it reasonably necessary that meetings be held so as to be reasonably accessible to all of the members. This points up the need for conferences when the commission is meeting as a whole. The word "meeting" seems to have a similar meaning, for example, a meeting of a board of directors or other group; such meetings are often of members from a limited area, as a meeting of county commissioners and similar groups. Smaller groups of larger groups are sometimes referred to as a meeting, for example, the meeting of committees of legislative and other groups. We entertain doubt that a meeting of less than a quorum of the commission may be said to be a "conference."

The preliminary paragraph of §112.061(6), F. S., is as follows: "For purposes of reimbursement rates and methods of calculation, per diem and subsistence allowances are divided up into the following groups (out-of-state, in-state, etc.) and maximum rates to be determined by the

agency head." This seems to give the agency head authority to reduce the maximum rate mentioned in the statute, if he deems that there is reasonable reason for making such a reduction and that the reduced rate would be adequate reimbursement. We also feel that the agency would also be authorized, by a majority vote, to make such reduction or direct its agency head to do so. Any such reduction of rates should be reflected by the minutes of the agency or an order of the agency head.

In the light of the above and foregoing authorities and discussion, we are inclined to the view that:

1. General meetings of the members of the commission (not less than a quorum thereof) constitute a "conference" within §112.061(6)-(b)1., F. S.

2. Meetings of committees, except committees of the whole, for the purpose of studying matters assigned to them (unconnected with regular commission meetings) do not seem to be conferences within §112.061-(6)(b)1., F. S., and per diem should not be paid in accordance therewith, but under the applicable subparagraph.

066-12—March 2, 1966

EDUCATION

NONPUBLIC SCHOOLS, CLASSIFICATION AND ACCREDITATION

To: Floyd T. Christian, Superintendent of Public Instruction, Tallahassee

QUESTION:

Does the state board of education have authority to prescribe standards for the classification and accreditation of nonpublic schools?

I have carefully examined Chs. 228-238, F. S., which, together with applicable population, special and local acts, and other general laws which may have application to school matters, comprise "The Florida School Code." I find nothing in any of such laws specifically granting to the state board of education any "authority to prescribe standards for the classification and accreditation of nonpublic schools."

Apparently the only authority in Florida law prescribing such standards is contained in Ch. 247, F. S., which establishes the "Board of Private Education." This chapter is limited in its application to "private schools" (as defined therein) voluntarily requesting a certificate of approval from such board, and purports to establish "those minimum standards necessary to insure that any school meeting such standards offers a minimum satisfactory education."

Your question is answered in the negative.

066-13—March 2, 1966

INSURANCE

FOREIGN INSURER—REGIONAL HOME OFFICE CONSTRUCTION OF TERM "SUBSTANTIAL OCCUPANCY"

To: Broward Williams, State Treasurer and Insurance Commissioner, Tallahassee

QUESTION:

What is meant by the term "substantially occupied" as appears in §624.0312, F. S., 1965?

Section 624.0312, F. S., authorizes certain exemptions and credits against the premium taxes imposed on insurers by §§624.0307 and

624.0308, F. S. Prior to revision and codification of the Florida insurance laws by the enactment of Ch. 59-205, identical language appeared in former §205.432, F. S.

In response to a similar question my predecessor in office held that:

> 1. In absence of court construction, reasonably it appears that the words 'substantially occupies,' appearing in the first paragraph of subsection 205.432(1), F. S., and 'substantially occupied,' appearing in subsection 205.432(1)(b), are to be construed as meaning the actual occupancy by a foreign insurance company of not less than seventy-five per cent of a building owned by it in Florida and designated as its regional home office within the purview of Section 205.432, F. S. Attorney General's Opinion 056-75, Biennial Report 1955-1956.

In light of the circumstances outlined in your letter of inquiry, we review that pronouncement.

You note that: Several of the foreign insurers planning regional home offices in Florida are confronted with delays in delivery of data processing equipment amounting in some instances to as much as three years. In the development of regional home office facilities those insurers have allocated a large amount of space for future installation of such electronic machines. It is the desire of several of these insurers to rent such space pending future delivery of the electronic equipment during the waiting period.

Significantly it has been held that:

> . . . 'Substantial' is [a] relative term, the meaning of which is to be gauged by all the circumstances surrounding the transaction, in reference to which the expression has been used. It imports a considerable amount or value in opposition to that which is inconsequential or small. Fuhrman v. American Nat. Building & Loan Ass'n, 14 P.2d 601, 604, 126 Cal. App. 202. Words and Phrases, permanent edition 40, Substantial, page 759.

and

> . . . The word 'substantial' is susceptible to different meanings according to the circumstances, and is variously defined as actual, essential, material, fundamental, although no rule of thumb can be laid down fixing its exact meaning. In re Opening Ballot Boxes and Counting Votes Cast in Second Precinct, Third Ward, Borough of Steelton, 195 A. 466, 467, 129 Pa. Super. 302. Words and Phrases, permanent edition 40, Substantial, page 759.

Also does it appear that "substantial" is to some degree synonymous with the words "important," "essential" and "material," as noted in the following cases:

* * * * *

> Actual, essential, material or fundamental. Ewald v. C. of I.R., C.C.A., 141 F.2d 750, 752.
>
> 'Substantial' means in substance, in the main, essential, including material or essential parts. White v. City of Ottawa, 230 Ill. App. 493.
>
> 'Substantial' is defined as 'important, essential, material.' Bank of Chatham v. Arendall, 16 S.E.2d 352, 355, 178 Va. 183.
>
> 'Substantial' means of moment, important, essential, or material. Vermont Accident Ins. Co. v. Burns, Vt., 40 A.2d 707, 710.
>
> Word 'substantial' means in substance or in a substantial

manner, materially or essentially. Neward Stove Co. v. Gray & Dudley Co., D.C. Tenn., 39 F. Supp. 992, 993.

An instruction that, if plaintiff failed in performance of his duty to exercise due care for his own safety 'in any particular,' then he was guilty of contributory negligence, and if such failure proximately contributed to the accident 'in any degree,' the plaintiff could not recover, was improper, and court properly inserted word 'substantial' preceding word 'degree.' 'Substantial' means not seeming or imaginary; not elusive; real; true; important; essential; material. Yeary v. Holbrook, 198 S.E. 441, 450, 171 Va. 266.

* * * * *

'Material' synonymous. Lewandoski v. Finkel, 29 A.2d 762, 764, 129 Conn. 526. Words and Phrases, permanent edition 40, Substantial, page 761.

Thus it appears that:

'Substantial' is a relative term, the meaning of which is to be gauged by all the circumstances surrounding the transaction in reference to which the expression has been used, and it imports a considerable amount of value in opposition to that which is inconsequential or small. Application of Scroggin, Cal. App., 22 P.2d 489, 491. Words and Phrases, permanent edition 40, Substantial, page 762.

Section 624.0312, F. S., has as its legislative history, Ch. 27989, 1953. Prior to the 1959 revision of the Florida insurance code it appeared as §205.432, F. S. Although the title to Ch. 27989, 1953, fails to indicate the intent of the legislature in the enactment of said chapter, consideration of its provisions leads but to the conclusion that it was intended to bring about economic development in this state by affording foreign insurers certain tax benefits thereby inducing them to locate regional home offices in this state.

In view of this obvious intention of the legislature there appears no reasonable basis for imposing a fixed limitation of 75% floor space occupancy on foreign insurers establishing regional home offices in this state when the question of "substantial occupancy" clearly is a question of fact to be determined on a case-to-case basis.

It does not appear that the provisions of §192.06(3), F. S., relating to the percentage of floor space of a building owned by educational, literary, benevolent, charitable and scientific institutions in this state, requiring that the rents, issues and profits of such property be used for the purposes of such institutions if they desire to maintain their ad valorem tax exemption status under §1, Art. IX, State Const., should be considered as a limitation applicable to occupancy of a regional home office facility by a foreign insurer.

In view of the above authorities and statutory provisions, it is my opinion that "substantially occupied" as appears in §624.0312, F. S., 1965 means that the foreign insurer actually, and to a material degree, in fact, occupies such facility. "Substantial" being a term of inexact definition, it is my opinion that whether a foreign insurer "substantially occupies" a regional home office facility is a question of fact which may be administratively determined by the Florida insurance commissioner upon an analysis of all circumstances surrounding the actual operation of such facility. This opinion is controlling insofar as conflict exists with AGO 056-75.

Your question is answered accordingly.

066-14—March 2, 1966

CRIMES

GAMBLING LAWS—GUEST BINGO GAMES AS CONSTITUTING VIOLATION—APPLICABILITY TO NONPROFIT ORGANIZATIONS

To: Don Genung, Sheriff, Pinellas County, Clearwater

QUESTION:

Does the game of "Guest" hereafter described constitute gambling under the laws of Florida?

STATEMENT OF FACT:

The game of "Guest" is played in the following manner: The participants purchase cards which are similar to bingo cards and a game is played in a manner similar to the way in which bingo is played. The result is predominantly determined by chance. The winner is asked a question which requires genuine knowledge to answer and is not merely a sham. If he answers the question correctly, he receives a prize which has previously been designated for the winner of that particular game.

Section 849.14, F. S., reads as follows:

> 849.14 *Unlawful to bet on result of trial or contest of skill, etc.—Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill,* speed or power or endurance of man or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of gambling, and shall be punished by imprisonment not exceeding six months or by fine not exceeding five hundred dollars. (Emphasis supplied.)

In determining whether a transaction is a gambling transaction, the courts look to substance rather than to form. Looking to the substance of the "Guest" game described above, it is my opinion that when a contestant pays his money for a card, he bets or wagers (1) that he will win the bingo-like game of chance, and (2) that, if he wins that game, he will also correctly answer the question propounded to him and receive the prize; that when the operator offers the prize, he bets or wagers that the contestant will not succeed in both winning the bingo-like game and correctly answering the question; and that, if correctly answering the question predominantly depends upon the exercise of skill, then the game constitutes gambling in violation of said §849.14, F. S.

I am further of the opinion that said game violates §849.11, F. S., which reads as follows:

> 849.11 *Plays at games of chance by lot.*—Whoever sets up, promotes or plays at any game of chance by lot or with dice, cards, numbers, hazards or any other gambling device whatever for, *or for the disposal of money or other thing of*

> *value* or under the pretext of a sale, gift or delivery thereof, or for any right, share or interest therein, shall be fined not exceeding one hundred dollars, or be imprisoned not exceeding three months. (Emphasis supplied.)

I think that when the contestant pays his money and plays the bingo-like game, he plays at a gambling device for a "thing of value," viz., the opportunity to gain a prize by correctly answering a question, and the opportunity to experience the thrill and excitement of having a question put to him with knowledge that he will receive the prize if he answers correctly.

It is not necessary that a "thing of value" be a tangible thing which can be held in one's hand or seen with one's eye. It may be merely amusement. I quote from 86 Corpus Juris Secundum 779 as follows:

> Thing of value. While *the term 'thing of value'* is most frequently applied to things which are tangible, it *is not necessarily restricted to tangible things, and it is generally recognized that amusement is a thing of value.* (Emphasis supplied.)

To the same effect as the underscored portion of the foregoing quotation from 86 Corpus Juris Secundum are the following gambling cases: People v. Gravenhorst, 32 N.Y.S.2d 760; People v. Cerniglia, 11 N.Y.S.2d 5, 7; Worl v. State, 183 N.E.2d 594; State v. Langford, 144 S.W.2d 448; Broaddus v. State, 150 S.W.2d 247; Hightower v. State, 156 S.W.2d 327; State v. Baitler, 161 A. 671; Kraus v. City of Cleveland, 19 N.E.2d 159; Myers v. City of Cincinnati, 190 N.E. 569, 570; Giomi v. Chase, 132 P.2d 715; Painter v. State, 45 S.W.2d 46, 47; and Alexander v. Martin, 6 S.E.2d 20.

Since mere amusement is a "thing of value" which may be gambled for, the opportunity to gain a prize in a "Guest" game by correctly answering a question, and the opportunity to experience the thrill and excitement of being asked a question with knowledge that a prize will be received if it is answered correctly, likewise constitute a "thing of value" for which the contestant gambles when he pays his money and plays the bingo-like game. Hence, my conclusion is that playing the "Guest" game violates §849.11, F. S.

I also think that the person having charge, control or management of a place who procures, suffers or permits people to play said game of "Guest" in such place, is guilty of violating §849.01, F. S., reading as follows:

> 849.01 *Keeping gambling houses, etc.*—Whoever, by himself, his servant, clerk or agent, or in any other manner has, keeps, exercises or maintains a gaming table or room, or gaming implements or apparatus, or house, booth, tent, shelter or other place for the purpose of gaming or gambling or in any place of which he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whatever, whether heretofore prohibited or not, shall be punished by imprisonment in the state prison. not exceeding three years, or by fine not exceeding five thousand dollars.

I understand that various nonprofit organizations wish to put on "Guest" games in order to raise money for worthy causes and that many senior citizens enjoy playing the game for amusement. However, the legislature has not seen fit to enact a statute which would

exempt such organizations and citizens from the operation of our gambling laws referred to above and I have no power to grant such an exemption. If there is to be any exemption, it must be granted by a law enacted by the legislature.

As our said gambling laws now stand, they apply alike to gambling promoted by nonprofit organizations, gambling for the amusement of senior citizens and gambling promoted by gambling syndicates. In other words, everybody is governed by the same rules of said gambling laws. As I have already indicated, only the legislature can exempt anyone from the operation of said laws.

066-15—March 11, 1966

WITNESSES

COMPENSATION OF MUNICIPAL OFFICERS APPEARING BEFORE GRAND JURIES AND PROSECUTING ATTORNEYS

To: Clair A. Davis, State Attorney, Clearwater

QUESTION:

What compensation, if any, are municipal police officers, appearing as witnesses before the grand jury and prosecuting attorneys authorized to file informations, entitled to?

Section 90.14, F. S., provides that:

> Witnesses in all cases, civil and criminal, in the circuit courts, county courts, county judge's courts, criminal courts of record and courts having jurisdiction of noncapital felony cases only, now or hereafter created, and witnesses summoned before any referee, arbitrator or master in chancery, shall receive for each day's actual attendance three dollars and also five cents per mile for actual distance traveled to and from the courts; in courts of justices of the peace, one dollar per day and the same mileage as in the circuit court.

Municipal police officers are not mentioned in §902.19(4), F. S., and should be excluded therefrom for purposes of the above-stated question.

State attorneys, under §27.04, F. S., and county solicitors, under §32.20, F. S., are authorized to summon witnesses to appear before them to testify as to any violations of the criminal laws of the state. Neither of said sections provides the compensation and mileage to be paid such witnesses for their attendance before the state attorney or county solicitor. We are inclined to the view that criminal proceedings consist, not only of the actual trial of the criminal case itself but also those preliminary proceedings, such as hearings before the grand jury and prosecuting attorneys authorized to file informations, and that such hearings may well be deemed a part of the criminal proceedings against the accused, although the criminal case itself may not be under way until the accused is arraigned on the indictment or information. The preliminary proceedings should generally be considered as a part of the overall criminal prosecution. The investigation of a criminal charge by a grand jury, state attorney or county solicitor, or other officer authorized to file criminal informations would doubtless constitute a case, civil or criminal, within the purview of §90.14, F. S., or a hearing or law action within the purview of §90.141, F. S.

Section 90.14, F. S., provides that witnesses in the courts therein named "shall receive for each day's actual attendance three dollars and also five cents per mile for actual distance traveled to and from the court." Although this act was amended by §8, Ch. 65-483, the purpose of the said amendment was to extend the operation of the act to "courts having jurisdiction of noncapital felony cases," and no other material amendment was made by the said 1965 act. Section 90.141, F. S., originated as §1, Ch. 63-508, and became a law and effective on June 18, 1963. Absent any other applicable statute, this section would appear to be broad enough to extend to witnesses appearing before grand juries and prosecuting attorneys authorized to file informations, also as would §90.14 of said statutes. The language of each said section being broad enough to be applicable to witnesses appearing before grand juries and prosecuting attorneys, we must determine the applicable statute.

Section 90.141, F. S., specifically applies to "any law enforcement officer of any municipality, county or the state who shall appear as a witness to testify in any hearing or law action in any court of the state as a direct result of his employment as a law enforcement officer," while §90.14, F. S., applies to "witnesses in all cases, civil or criminal," in the several courts therein mentioned. This applies to witnesses generally, and not specifically as to particular witnesses, as does §90.141, F. S. It is a general rule of statutory construction that general (§90.14, F. S.) and special or limited (§90.141, F. S.) statutes should be read together and harmonized, if possible, but to the extent of any necessary repugnancy between them, the special or limited statute will prevail over the general unless it appears that the legislature intended to make the general one controlling. (82 C.J.S. 839-845, §369, and Florida cases cited in note 19, p. 840 and in the supplement).

When we read §§90.14 and 90.141, F. S., together, §902.19(4), F. S., not having any application because municipal police officers are not mentioned therein, we find that law enforcement officers of municipal corporations, as well as of the counties and the state, are specifically included, when they are witnesses as a direct result of their employment as such officers. Section 90.14, F. S., is a statute of general application, while §90.141, F. S., is one of special application, within the rule referred to in 82 C.J.S. 839-845, §369, above-mentioned, and should be construed in accordance with the rule therein mentioned.

We, therefore, come to the conclusion that municipal law enforcement officers, appearing as official witnesses to testify before the grand jury or a prosecuting attorney authorized to file criminal informations, as a direct result of their employment as municipal law enforcement officers, and concerning information obtained by them as such law enforcement officers, should be paid under and pursuant to §90.141, F. S.; otherwise, they should be compensated under §90.14, F. S.

066-16—March 11, 1966

TAXATION

REFUNDS OF CIGARETTE TAXES ILLEGALLY PAID TO A MUNICIPAL CORPORATION

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Where cigarette taxes are distributed to a municipal corporation which has complied with §210.03, F. S., on the basis of the post office addresses of the purchasers thereof instead of the actual location of such purchasers so that such taxes have been illegally distributed through error, may the state, including its beverage department, require a refund of the illegally distributed taxes?

Section 210.03, F. S., insofar as here material, provides that "any municipality in this state may, in the discretion of its governing body impose an excise or privilege tax upon the sale, receipt, purchase, possession, consumption, handling, distribution and use of cigarettes *sold or to be sold at retail within the territorial limits of such municipality* up to the same amount for the same size and the same package contents" as are imposed by the state thereon under and pursuant to §210.02, F. S., with the amounts paid for the said municipal taxes to be credited against the said state tax, even up to the full state tax. This municipal tax is limited to cigarettes sold or to be sold at retail within the territorial limits of the municipality. This tax is limited to cigarettes sold or to be sold within municipal territorial limits, not to persons or firms having a post office address within such municipality. A sale of tangible personal property to a person, firm or corporation having a post office address within a municipality may or may not be a sale "within the territorial limits" of such municipality.

It is our information that the beverage department, its officers and agents, deemed the addresses given on the cigarette tax returns made to it, giving an address of a sale of cigarettes as a street address, post office address, or other address of a municipality as being a location until it was brought to their attention that such was not the case in all instances and that in many instances sales were deemed to have been within a municipality by reason of an address given in the tax returns, which upon investigation were found to have been sales made outside of, and not within, a municipality and that such error was in fact a general error that had been made over a period of time. The beverage department, upon learning of such errors in audits and calculations, caused a reaudit and recalculation of its cigarette tax accounts and ascertained therefrom that many municipalities had been paid cigarette tax funds to which they were not entitled, such overpayments being in fact and law erroneous payments of state cigarette tax funds.

It was stated in First State Bank of Fort Meade v. Singletary, 124 Fla. 770, 169 So. 407, text 408, that "it is settled that money paid under a mistake of facts may be so recovered (action for money had and received), it being considered unconscionable that money so paid should be detained by the payor on his discovery of the mistake and demand for the money's return."

"The duty of a corporation to refund money obtained by mistake

or without authority of law arises not from any contract entered into by it on the subject, but from the general obligation to do justice, which binds all persons, natural or artificial. This rule applied to a municipal corporation which has collected tax money which legally belongs to an adjoining political subdivision . . ." (38 Am. Jur. 201, §521). An action on a contract implied by law will lie to recover money paid by mistake. (Holbrook & Archer v. Allen, 4 Fla. 87; Cullen v. Seaboard Air Line R.R. Co., 63 Fla. 122, 58 So. 182, text 184; Liddon v. Hatton, 64 Fla. 361, 60 So. 340, text 341; Gilmore v. Texas Co., 100 Fla. 169, 129 So. 587; Citizens Bank v. First Nat. Bank, 101 Fla. 908, 132 So. 478, text 479; Sears v. Gulf Refining Co., 113 Fla. 714, 152 So. 1, text same; Moss v. Condict, 154 Fla. 153, 16 So.2d 921, text 922).

The money having been paid to the municipality through error and mistake it should be refunded and a proceeding for money had and received would lie by the state or its agency against the municipality. An action for money had and received presupposes something in the nature of a trust. (Eichenberg v. Magidson's Estate, Mo. App., 170 S.W.2d 105). In actions for accounting the defendant may plead set-offs and counterclaims due him by the plaintiff (1 C.J.S. 673 and 674, §38); this would seem to indicate that upon an action by a municipality against the state and its beverage department for cigarette tax funds due it, that the state and beverage department would be permitted to set-off or recoup the taxes illegally paid the municipality by reason of the error and overpayment aforesaid.

We, therefore, feel that the state and its beverage department may set-off any sums due by a municipality for overpayment to it of taxes against cigarette taxes payable currently or in the future to municipalities.

The question has been posed by one of the municipalities as to the effect of pledges heretofore made by municipalities for the purpose of securing the payment of revenue bonds, certificates of indebtedness and other obligations, and the right of the state and its beverage department to withhold cigarette tax funds improperly or illegally paid to the municipalities as aforesaid. Under §210.03, F. S.: "upon the sale, receipt, purchase, possession, consumption, handling, distribution and use of cigarettes *sold or to be sold at retail within the territorial limits of such municipality* . . ." Cigarettes sold or to be sold outside of the territorial limits of the municipality is outside of the taxing powers of the municipality under said §210.03, F. S.; in such a case there is a want of municipal jurisdiction to tax under said §210.03, F. S. No bondholder or creditor of the municipality could legally acquire a vested interest in or to the taxes imposed by Ch. 210, F. S., upon cigarettes sold or to be sold outside of said municipalities' corporate limits.

Under such circumstances the taxes imposed are state and not municipal taxes. "Taxation being a governmental function, rather than a proprietary function, ordinarily there can be no estoppel against a government or governmental agency with reference to the enforcement of taxes." (31 C.J.S. 730 and 731, §147). We do not think that under ordinary and usual circumstances the state would be estopped from obtaining a refund of taxes illegally paid to the municipalities when no tax was legally due to the municipality under §210.03, F. S.

The above-stated question is answered in the affirmative. Such refunds may be obtained by withholding taxes due and payable to the municipality until such refunds have been made or such withheld taxes equal the taxes improperly paid over to the municipalities.

066-17—March 11, 1966

TAXATION

TAX EXEMPT STATUS OF RELIGIOUS CORPORATIONS AND ORGANIZATIONS—STATUS OF OUT-OF-STATE CORPORATIONS

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. When and under what circumstances may the real and personal property of a religious corporation or organization be granted exemption from ad valorem taxes when located in Florida?

2. Does the fact that the owner of such real and personal property is a foreign corporation or organization affect the answer to question 1?

Constitutional provisions.—It is provided in §1, Art. IX, State Const., that: "the legislature shall provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, *exempting such property as may be exempted by law* for municipal, educational, literary, scientific, *religious* or charitable purposes." (Emphasis supplied.) We also note §16, Art. XVI, of the said State Const., which requires that: "the property of all corporations, except the property of a corporation which shall construct a ship or barge canal across the peninsula of Florida, if the legislature should so enact, whether heretofore or hereafter incorporated, *shall be subject to taxation* unless such property be *held and used exclusively for religious*, scientific, municipal, educational, literary or charitable purposes." (Emphasis supplied.) Although the State Const., makes specific provision for the tax exemption of homesteads up to a valuation of $5,000, and other specific tax exemptions, there is no specific exemption of religious properties as such.

Limitation on power of legislature.—In the light of said §1, Art. IX, and §16, Art. XVI, of the State Const., the Sup. Ct. in L. Maxcy Inc., v. Federal Land Bank, 111 Fla. 116, 150 So. 248, text 250; State v. St. John, 143 Fla. 544, 197 So. 131, text 134; and Palethorpe v. Thomson, Fla., 171 So.2d 526, text 529, held said sections to be "a limitation upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself." In L. Maxcy Inc. v. Federal Land Bank, *supra;* and State v. St. John, *supra*, the same court said that "undoubtedly the legislature is without power to provide for exempting from taxation any class of property which the constitution itself makes no provision for exempting; and in Palethorpe v. Thomson, *supra*, the same court said that "the Florida Constitution is a limitation on power and not a grant of power. Consequently, the legislature cannot exempt from taxation any class of real or personal property which the constitution itself makes no provision for exempting," supporting said statement by the citation of L. Maxcy, Inc., v. Federal Land Bank, *supra;* State v. St. John, *supra;* and State v. Doss, 146 Fla. 752, 2 So.2d 303, text 304; Daytona Beach Racing and Recreational Facilities District v. Paul, Fla., 157 So.2d 156, text 161.

From the above constitutional provisions and court decisions construing them, we arrive at the conclusion that the power and authority of the legislature to provide for exemptions from ad valorem taxation,

not specifically provided for in the State Const., such as §9, Art. IX, State Const., in relation to widows and persons who have lost a limb or been disabled in war or by misfortune; §13 of said Art. IX, relating to motor vehicles and house trailers, etc.; and homesteads under §7, Art. X, State Const., is contained in §1, Art. IX, and §16, Art. XVI, State Const., and is limited to property held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes, and for no other purpose or purposes.

Construction of exemption statutes.—Although generally taxing statutes are construed strictly against the taxing authority and in favor of the taxpayer (84 C.J.S. 158-160, §58) statutes providing for tax exemptions are strictly construed in favor of the taxing authority and against the taxpayer (84 C.J.S. 437, §227). This rule finds support in numerous Florida cases cited in footnote 83 on pp. 437-440. See also State v. City of Pensacola, Fla., 126 So.2d 566, text 569; State v. Thompson, Fla., 101 So.2d 381, text 386; Green v. Pederson, Fla., 99 So.2d 292, text 296; and other cases. This being true, tax exemption statutes and laws including constitutional tax exemption provisions, should receive a strict construction so that any person claiming tax exemption must show clearly that he is entitled under the law to the exemption. Section 192.06, F. S., and each and every subsection thereof providing tax exemption for the properties therein mentioned must be held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purpose or purposes. This is a limitation imposed by §1, Art. IX, and §16, Art. XVI, State Const., upon the legislature and is applicable to all statutes and acts of the legislature providing for tax exemptions. Whether a parcel of land or item of personal property is within this rule and entitled to tax exemption is largely a question of fact to be determined by the assessor of taxes or county board of tax equalization when presented to said board.

Ownership not determinative of exemption.—The fact that title to real or personal property is vested in a religious corporation, association, board, commission, bishop, priest, or other religious personality, is not of itself sufficient to show a right to tax exemption within the purview and intention of §1, Art. IX, and §16, Art. XVI, State Const., or §192.06, F. S., or any other tax exemption statute of Florida. The said property must also be "held and used exclusively for religious, scientific, educational, literary or charitable purposes," and it is the duty and obligation of the taxpayer to make this fact clearly apparent to the assessor of taxes by return or otherwise, unless such use is clearly apparent to the extent that judicial notice thereof may be taken by the assessor of taxes.

It is the duty of the taxpayer claiming tax exemption to clearly show unto the assessor of taxes that the property is so used before the claim of tax exemption may be granted or allowed. By reason of §1, Art. IX, and §16, Art. XVI, State Const., the authority of the legislature to grant tax exemptions is limited to exemptions where the property in question is "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Said sections and articles of the State Const., have been held to be limitations upon the legislature to grant tax exemptions.

Use the basis for tax exemption.—In University Club v. Lanier, 119 Fla. 146, 161 So. 78, text 79, the Sup. Ct. of Fla., said that "it is a general rule that exemption is determined by the use and ownership of the property and not altogether by the charter of the institution which owns and uses that property. It is only property that is held and used *exclusively* for religious, scientific, municipal, educational, literary or

charitable purposes which may be exempt from taxation under the Constitution." (Emphasis supplied.) To the same effect see also Grand Lodge Etc. v. City of Live Oak, 130 Fla. 386, 177 So. 738, text 740; State v. St. John, 143 Fla. 544, 197 So. 131, text 134; State v. Doss, 146 Fla. 752, 2 So.2d 303, text 304; State v. Doss, 150 Fla. 486, 8 So.2d 15, text 16; and State v. Inter-American Center Authority, Fla., 84 So.2d 9, text 16; Lummus v. Florida Adirondack School, 123 Fla. 832, 168 So. 232, text 238. In State v. Doss, 150 Fla. 486, 8 So.2d 15, text 16, the Sup. Ct. said that "the right to exemption is determined by the use of the property and not by the character of the corporate owner," and in State v. Inter-American Center Authority, *supra*, that: "the criterion for exemption from taxation is the character of the use to which the property is put and not the character of the ownership."

Religious purposes, exemption for.—Here we are concerned with a so-called religious corporation or organization. Real and personal property held and used exclusively by a religious corporation or organization is not entitled to tax exemption under §1, Art. IX, and §16, Art. XVI, State Const., unless and until such property is "held and used exclusively for (some) *religious*, scientific, municipal, educational, literary or charitable purposes." (Emphasis supplied.) It is not sufficient that such property be owned and held exclusively for one or more of the said purposes, but it must also be used exclusively for one or more of said purposes. Neither ownership for one or more of the said purposes, nor use for one or more of said purposes, is sufficient to entitle one to the tax exemption; both ownership and use must combine in the same person, firm or corporation. The ownership of a parcel of property by a religious corporation or organization is not within itself sufficient to entitle the owner to tax exemption, but there must also be a use of the property for a religious purpose; neither is sufficient without the other. Section 16, Art. XVI, State Const., contemplates that "such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." This section and article of the State Const., relates primarily to corporations, while §1, Art. IX of the said constitution relates to other property owners.

"Religious purpose" as applied to the uses of property within the requirements of tax exemption statutes and laws, is defined in 84 C.J.S. 587, §289, as "a use of property by a religious society or body of persons as a stated place of public worship, sunday schools, and religious instruction" with the word purpose meaning the "object or end to be attained." The word "religious" is defined in 76 C.J.S. 729, as "of or pertaining to religion; concerned with religion." When the words "religion" and "purpose" are considered together they show a religious purpose to be a purpose pertaining to or concerned with religion or its purposes. A religious society is defined, in 76 C.J.S. 734, §1, as an assembly, meet or body of persons who meet for the worship of God and religious instruction. Some courts have deemed "religious purposes" and "religious worship" as analogous words for some purposes. (36A Words and Phrases, Perm. Ed. 477-479). Before items of jewelry to be tax exempt on the basis of a religious use or purpose they must be used for a particular religious purpose or purposes, which must be divorced from any purpose of personal adornment. (Salvation Army v. U. S. DCNY 138 Fed. Supp. 914, text 917).

In Board of Foreign Missions v. Board of Assessments, 202 N.Y.S. 50, text 52, the board owned several buildings, including one run as a hotel, except that certain religious workers were given a preference as to rooms, a club house, assembly rooms, bowling alley, shower baths, garage, etc., from which substantial income was derived from outsiders,

which were deemed by the court as property not used exclusively for religious purposes. In Wesley Foundation v. King County a Wesley Foundation (Methodist) building used in the usual manner for such buildings was held tax exempt. In Trustees of New Hampshire Conference v. Town of Sandown, 87 N. H. 47, 173 A. 805, text 806, a superannuates home used to house retired preachers was held tax exempt. (See also "religious purposes" in 36A Words and Phrases, Perm. Ed. 477-479, for other examples, as well as "Religious Uses" 36A Words and Phrases, Perm. Ed. 483 and 484).

Often in connection with tax exemptions for use of property for religious purposes or uses, the question of scientific, educational, literary and charitable uses may also become involved as a collateral question. Many churches and religious organizations own and use sunday school rooms and other educational facilities and equipment, as well as carry on charitable purposes. Without delving in this opinion into what are scientific, educational, literary and charitable uses, permit us to say that the constitutional and statutory requirement for properties to be entitled to tax exemption for such uses, the same requirement that such property be held and used exclusively for such purposes is applicable in each case. The word "exclusive" when used in connection with the occupancy of a building or facility "means possessed to the exclusion of others; possessed and enjoyed to the exclusion of others; debarred from participation or enjoyment; not including, admitting or pertaining to any other, etc." (33 C.J.S. 112).

The phrase "exclusively used" when used with reference to taxation and charitable, educational, religious, etc., purposes, have usually held the term "exclusively used" to refer to a primary and inherent use and not a secondary or incidental use. The secondary or incidental use may not affect or interfere with the primary use. Whether a use is a primary or inherent use or a secondary or incidental use is largely a question of fact to be determined by the assessor of taxes in the first instance from matters within his personal knowledge and such other information as the taxpayer may include in his return and otherwise. The primary obligation is on the taxpayer to demonstrate by sufficient and competent evidence his or its right to tax exemption.

Parsonages are included with houses of public worship, that is, churches, in §192.06(4), F. S. Generally tax exemptions do not extend to parsonages used for residential purposes unless it be otherwise provided in the statutes or laws (84 C.J.S. 595, §291). This being a tax exemption statute should be strictly construed (84 C.J.S. 158-160, §227). To be entitled to tax exemption as a parsonage a building should be used primarily and inherently for such purpose, and not for any other nontax exempt purpose. Parsonages may be used for tax exempt religious purposes in addition to its use as a parsonage without losing tax exempt status, but use for taxable purposes renders such parsonage taxable at least as to the portion thereof used for nonexempt purposes.

In State v. Doss, 150 Fla. 491, 8 So.2d 17, text 18, the Sup. Ct. of Florida approved the practice of taxable separation of the portion of buildings used for tax exempt purposes from the taxable portion thereof, fixing a taxable value and imposing taxes thereon, of the portion used for taxable purposes, exempting the portion used for tax exempt purposes. To the same effect; see also Simpson v. Bohon, 159 Fla. 280, 31 So.2d 406, text 407 and 408; Gwin v. City of Tallahassee, Fla., 132 So.2d 273, text 286. Under this rule when a portion of a building is held and used exclusively for a tax exempt purpose while the other portion is not so used, such portions may be valued separately and the taxable portion taxed and the tax exempt portion exempted. For example

in Simpson v. Bohon, two floors of a building were used for a tax exempt purpose, but the first floor was used for a rental and nontax exempt purpose and was valued for tax purposes and taxes were imposed on that valuation, which procedure was upheld by the courts.

The general rule seems to be that generally tax exemptions accorded to domestic corporations are not usually applicable to foreign corporations (84 C.J.S. 510, §268), especially where the exemption is based on the character of the owner instead of the use of the property. (84 C.J.S. 510, §268). It is stated in 84 C.J.S. 510, §268, that "exemptions from taxation may be extended to foreign corporations, as where the exemption is accorded not to the owners but to the properties, and the foreign corporation's property falls within the terms of the exemption provision . . ." Under the State Const., the exemption is based on the use of the property, not the character of the owner. It is stated in a note in 84 C.J.S. 563, §283, note 88, that the basis of educational exemption to private schools is the "recognition of the fact that they perform a service which the state would or should otherwise have to perform so that there is consequent relief of tax burden of others."

A similar benefit would appear from churches and religious facilities, including church schools, maintained in this state by foreign religious corporations, especially in those cases where the operation of the churches and religious facilities is comparable to those operated for the use and benefit of citizens and residents of this state. We are inclined to the view that before a foreign corporation incorporated and organized for the purpose of carrying on a religious, scientific, educational, literary or charitable business or purpose in this state may be entitled to tax exemption under the laws of this state that such foreign corporation must be engaged in a religious, scientific, educational, literary or charitable business in this state, in a similar manner and to a like extent as do comparable corporations and institutions incorporated or domiciled in this state and doing business in this state.

From the above constitutional and statutory provisions of this state, as well as the authorities cited, mentioned and quoted, we reach the following conclusions:

1. That the provisions of §1 of Art. IX, and §16 of Art. XVI, State Const., and the tax exemptions statutes relative to the tax exemption of properties used in this state for religious, scientific, educational, literary, and charitable purposes, are applicable to both the properties of domestic and of foreign corporations, associations and organizations, located in this state to the extent that such properties are used for such religious, scientific, educational, literary and charitable purposes, limited, however, to the extent of such use for the benefit of this state or its people.

2. The second question is answered in the negative.

066-18—March 11, 1966

TAXATION

DOCUMENTARY STAMPS—TRADE ACCEPTANCES

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Are trade acceptances, as known in the mercantile field, written obligations to pay money, within the purview of §201.08, F. S., and taxable thereunder?

A "Trade Acceptance" is defined in Webster's dictionary as "a bill of exchange arising out of a current merchandise transaction drawn by the seller of the goods on the buyer for the purchase price and accepted by the buyer by signed acknowledgment upon the instrument," and in Black's law dictionary, as "a draft or bill of exchange drawn by the seller on the purchaser of goods and accepted by such purchaser." This definition appears from the said Black's law dictionary to have been derived from Luikart v. Massachusetts Bonding and Ins. Co., 129 Neb. 771, 263 N.W. 124, text 129. See also definitions accumulated in 42 Words and Phrases, Perm. Ed. 234-236. The term is defined in 10 C.J.S. 417, §8, as "a draft or bill of exchange drawn by the seller on the purchase of goods sold and accepted by such purchaser." See also Gilliland & Echols Farm Supply and Hatchery v. Credit Equipment Corp., 269 Ala. 190, 112 So.2d 331, text 332 and 333, where the term was defined substantially as above, after which the court said that: "When properly drawn it is negotiable paper and its use results in advantages to both the purchaser and the seller. Properly used, it represents current merchandise transactions only, and in this respect it differs from an ordinary promissory note, which may be given for a past due account, borrowed money or for any other consideration. The principal function of a trade acceptance is to take the place of selling goods on an open account."

Trade acceptance is defined in 11 Am. Jur. 2d 44 and 45, §15, in language substantially as above, with the further comment that a trade acceptance is "ordinarily turned into cash by the seller through enforcement and discount and the situation is substantially the same as if the buyer had given the seller his promissory note. A trade acceptance in usual form is a negotiable instrument."

In Anderson's uniform commercial code, in his "Legal Forms," pp. 337 and 338, Forms 3:5 and 3:6, appear forms of "Trade Acceptances" substantially as follows:

No. _____ 19_____ $_____

On _____ 19____, pay to the order of _____

_____, _____ Dollars ($_____).

This obligation of the drawee hereof arises out of the purchase of goods from the drawer. The drawee may make this trade acceptance payable at any bank, banker or trust company in the United States which he may designate.

To _____

(Bank where payable and its location)

Due _____, 19____.

Drawee

A bill of exchange is defined by the negotiable instruments act (see §676.01, F. S.) as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable time, a sum certain in money to order or to bearer." "A check is a bill of exchange drawn on a bank payable on demand." (§676.48, F. S.) Generally the provisions of law applicable to a bill of exchange payable on demand apply to a check. See also 11 Am. Jur. 2d 41 and 42, §13 and 11 Am. Jur. 2d 47, §17. It was said in Mt. Vernon National Bank v. Canby State Bank, 129 Ore. 36, 276 P. 262, that a sight draft is a check payable on demand. A negotiable instrument payable at a time certain is overdue as soon as that time has passed. (11 Am. Jur. 2d 550 and 551, §487). It has been said that: "The character of a paper which is in form a draft is not affected by calling it a trade acceptance. A trade

acceptance is a draft or bill of exchange drawn by a purchaser of goods sold, and accepted by the purchaser." (42 Words and Phrases, Perm. Ed. pp. 234-236). From these authorities it appears that a "trade acceptance" in the form above set out, or in a similar form, payable on demand or on presentation would in law be a bill of exchange in the form of a check. They are not strictly speaking written obligations to pay money, at least until accepted by the drawee. They are sight drafts or bills of exchange, when payable on a future day certain or on demand.

Bills of exchange, checks, drafts and trade acceptances, having the elements of negotiability, have been held to be negotiable instruments (10 C.J.S. 428 and 429, §23). Unless a bill of exchange, draft or trade acceptance may be construed as the promissory note of the drawer, the drawee's acceptance, or acceptor's acceptance thereof is necessary in order to render the drawee liable thereon. The trade acceptance form above set out would not become the written obligation of the drawee unless and until accepted by the drawee thereof when it would become a bill of exchange, draft or other obligation of the drawee payable at the time mentioned in said trade acceptance or on presentment if no other date be mentioned. The said trade acceptance will not become a written obligation of the drawee until signed by the drawee. When so accepted there would be little if any difference between the said instrument and a check or a draft payable on presentment. A trade acceptance payable on a day in the future would become a written obligation of the drawee from and after his acceptance of the same. In his opinion of Sept. 24, 1931 (1931-1932 AGO 831) former attorney general Landis held acceptances of negotiable instruments for honor to be written obligations for the payment of money within the documentary stamp taxing statutes. Attorney general Landis, by his opinion of June 28, 1932 (1931-1932 AGO 1006), held that: "An ordinary bank check is only an order for the payment of money, and is not a written obligation to pay money," and further held that this rule was not changed by reason of the post dating of a check. When a purchaser of goods signs the trade acceptance form set out above, payable on a fixed date in the future, although directed to a bank, such instrument would appear to be more than a mere order to pay money, as between the drawer and drawee, and would become, as between such drawer and drawee, a written obligation to pay money, in the nature of a time draft. When payable at sight or on presentation it would seem to take on the nature of a check, not within the purview of §201.08, F. S., and not subject to taxation thereunder.

Trade acceptances, as known to the mercantile field, when payable on a date subsequent to acceptance, are written obligations for the payment of money from the date of such acceptance, but are in the nature of checks when payable on demand or presentation and presentation is made forthwith after acceptance.

066-19—March 11, 1966

SHERIFFS

FEE FOR SERVICE OF PLEADINGS IN CONDEMNATION ACTION

To: Robert Grafton, District Counsel, Central and Southern Florida Flood Control District, West Palm Beach

QUESTION:

What is the proper fee due a sheriff by a state agency for the simultaneous service of the petition, declaration of taking, and notice to appear and show cause and notice of hearing (combined in one) in eminent domain, on one defendant?

Section 30.231(1), F. S., states:

Service of summons and subpoenas.—

(1) In all counties of this state the fee charged in civil cases for each service of a summons or writ, except witness subpoenas and executions shall be five dollars. The fee charged in civil cases for the service of witness subpoenas shall be three dollars fifty cents for each witness subpoenaed. The flat fees established herein shall supplant the civil fees for service, mileage, copy and return otherwise provided for in §30.23, and further providing that this act shall not affect the fees now being collected in any county under a special act. Fees for executions shall remain unchanged by this act.

I must respectfully disagree with that which was stated in AGO 063-98, Aug. 12, 1963, by my predecessor in office. In said opinion, he stated:

> I am of the opinion that where a restraining order, issued by a judge before whom a proceeding is pending, is served at the same time as a summons and copy of the complaint, the sheriff would be entitled to a fee of $5.00 for the service of summons and additional fee of $5.00 for the service of such restraining order . . .

Although there are no Florida cases on this point, research has revealed one federal case construing a similar statute. This is the case of Burroughs Bros. Mfg. Co. v. Dulaney *et al*, 238 F. 255. In this case a marshal served on each of four defendants a writ of summons with a copy of the declaration attached. The applicable statute stated that the marshal shall receive "for service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpoena for a witness, two dollars for each person on whom service is made." The marshal then charged $4.00 for the service on each person on the theory that the two papers, to-wit: the writ of summons and the copy of the declaration constituted each a service of a separate writ. The court decided that the marshal was entitled to only a fee of $2.00. In said opinion, the court stated:

> It is right, and for two reasons: First, a copy of the declaration is not a writ of any kind, and the particular provision upon which the marshal relies applies only to writs; and, second, it would in any event be a strained construction to hold that Congress intended that the marshal should charge for the number of papers, at one time in the same case delivered to one person, rather than for *service* upon such person at one time. (Emphasis supplied.)

The court further stated:

> I have been referred to no authority on the question, and have been able to find none, but it seems to me to be perfectly clear that a reasonable construction of the statute limits the marshal to one fee of two dollars for one service at one time in one cause on one person, no matter how many papers, copies, orders to show cause, etc., may be served by him on that one individual at the one time, and in the one cause.

We are of the opinion that the same conclusion is demanded in the situation presented by your letter.

We are cognizant of the provisions relating to service of process found in Chs. 73 and 74, F. S. However, it should be noted that Ch. 74 is supplemental in nature to Ch. 73 and, further, that said process provisions do not require that said document be served separately and at different times. In fact, it is specifically allowed by §74.031, F. S., that the declaration of taking may be served simultaneously with the petition.

In arriving at this conclusion, this office is aware of the ever-increasing cost of litigation. It is certainly well-known that in many instances the economic burden of maintaining suit is of such a substantial nature that the impoverished are frequently precluded from use of the courts in seeking justice. The courts of the state should always remain open for those who seek the free administration of justice.

It appears clear, therefore, that a sheriff making a service on one defendant at one time in one cause of action is entitled to but one fee of $5.00 regardless of the number of additional papers served with the initial service of process, and regardless of the legal definition which might be attached to any of the additional papers.

Attorney general's opinion 063-98, Aug. 12, 1963, is modified accordingly.

I believe that this substantially answers the question which you have posed.

066-20—March 14, 1966

PUBLIC SCHOOLS

LIABILITY INSURANCE—AUTHORITY OF COUNTY BOARD TO CARRY POLICIES ON BUILDING USED FOR STORAGE OF RADIOACTIVE MATERIALS

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Where radioactive materials used for instructional purposes are in the custody of a regular instructor at a junior college and are kept in a locked storage room or vault at such junior college under the supervision of such instructor who has full responsibility therefor, is it legal for the appropriate county board of public instruction to pay premiums on public liability insurance covering such building and contents with respect to bodily injury and property damage?

2. If it is not legal for the board to pay such insurance premiums, may the county board pay premiums for liability insurance issued to the instructor of Pensacola junior college who has custody and responsibility for the storage and use of said radioactive materials?

The preamble to §230.23, F. S., and the relevant portions of §§230.23(9) and 230.23(9)(d), F. S., provide:

> The county board acting as a board shall. . .
>
> (9) SCHOOL PLANT.—Approve plans for . . . insuring . . . school property . . . as follows:
>
> (d) *Insurance of school property.*—Carry insurance on every school building in all school plants including contents, . . .; and on all . . . other property under the control of the county board or title to which is vested in the county board. . .

In your letter requesting this opinion you state:

> These radioactive materials are in the custody of the regular instructor at Pensacola junior college, and are kept in the locked storage room or vault under his supervision and he is responsible for the same.

Although you do not specifically so state, it is assumed that said "storage room or vault" is in one of the buildings comprising the school plant. If so, it follows that such radioactive material is part of the "contents" of a building in the school plant and meets the requirements for insurability as set forth in §230.23(9)(d), F. S.

The first paragraph of §230.23(9)(d), F. S., with certain exceptions, requires the county board to carry property damage insurance covering its own physical plants "including contents, boilers and machinery." The second paragraph of that subsection speaks of an insurance contract "between the county and the named insured," and then continues in the following language: "Immunity of the *county board* against liability damage is waived to the extent of liability insurance carried by the *county board.*" (Emphasis supplied.)

On the basis of such reference to waiver of immunity, I am of the opinion that the county board is, by implication, authorized by law to carry public liability insurance, and since payment of premiums is an integral part of an insurance contract, the county board would be required to pay the premiums in any such contract to which it is a party.

066-21—March 14, 1966

EDUCATION

FLORIDA EDUCATIONAL TELEVISION COMMISSION—LEGAL SCOPE OF OFFICIAL ACTIVITIES

To: Glenn Marshall, Jr., Chairman, Florida Educational Television Commission, Jacksonville

QUESTION:

> **What is the legal scope of the official activities of the Florida educational television commission as it may be applied to the development of educational television in Florida?**

Educational television became a part of the state educational system with the passage of Ch. 57-312, which has become Ch. 246, F. S. This law has continued in force from the time of its passage with but two minor amendments, which do not apply to the question you present.

The 1957 Florida legislature had before it, and apparently relied thereon, a recommendation from the governor on the subject of educational television, reported in the journal of the house of representatives for Apr. 2, 1957, and a printed report of the committee on educational television.

This 66-page report reviewed in detail the growth of educational television, and made a number of specific recommendations. Legislation carrying out these recommendations resulted in the passage of Ch. 57-312.

In this act, §9 (now §246.09, F. S.) stated:

> The commission is authorized to encourage:
>
> (1) The activation of unused reserved educational television channels;
>
> (2) The extension of educational television network facilities;
>
> (3) The coordination of Florida's educational television system with those of other states; and
>
> (4) The further development of educational television within the state.

Further, in §10 of the act (§246.10, F. S.) it declared:

> The commission is authorized to act as advisor and consultant to educational television stations and programs, whether supported by state, county, city or private funds.

Section 11 of the act (§246.11, F. S.) reads as follows:

> The commission may cooperate with and assist all local and state educational agencies in making surveys pertaining to the use and economics of educational television in the fields of primary, elementary, secondary or college level education and in the field of adult education. The commission may also assist all public agencies in the planning of programs calculated to further the education of the citizens of the state. *The commission shall review and approve all budgets of state agencies for the preparation or dissemination of educational television programs as provided for herein.* (Emphasis supplied.)

Throughout the act itself, the basic recommendations of the special committee were put into law, so we must assume that the text of the special report was familiar to and was adopted by those who framed and approved the legislative bill which became Ch. 57-312.

Finally, §14 of the act (§246.14, F. S.) provided as follows:

> The provisions of this chapter shall be liberally construed in order to effectively carry out the provisions of this chapter in the interest of public education.

Over the past 8 years the educational television commission thereby created has established the physical part of a number of broadcasting facilities, within the framework of the legislative appropriations therefor. But the work of the commission so far, admirable as it has been, has been largely devoted to the establishment of some of the physical and mechanical vehicles by which educational material may be delivered to prospective audiences, either in the classroom or in the private homes of learners. If we are satisfied that the original planning and concept of educational television envisioned also the "development" of educational television (and the record bears this out), then this second important function of the commission still lies ahead.

The legislature charged this commission with the "further development" of educational television within the state. (§246.09(4), F. S.) This objective of the legislature is a companion to the authorization for activating educational television channels, extending educational television network facilities, and coordinating such a system with other states. These last have largely been accomplished.

But the legislature has gone farther. It has charged this commission with acting as "advisor and consultant" to all educational television stations and programs in the state (§246.10, F. S.)

The legislature, making certain that the commission had sufficient authority in the "development" of educational television, has given it the power to "review and approve all expenditures of public funds by state agencies for the *preparation or dissemination* of educational television programs" as provided for in the act itself. (Emphasis supplied.) (§246.11, F. S.)

The "development" of educational television within this state must therefore become increasingly involved in the production of sound programs, as contemplated by Ch. 57-312. We must assume that the legislature had in mind the comments of the special committee on such development, as well as the other features which have been written into the law. We conclude, therefore, that the legislature intended the educational television commission to be concerned with such development.

The scope of authority of the educational television commission is limited only by its conception of what is now necessary for the "further development of educational television within the state," together with the acquiescence of future legislatures and of the various affected units of the state educational system in the financing necessary for such development.

Specifically, the thinking of the legislature of 1957, as it followed the suggestions of the planning committee, was that the commission then created would be concerned with the establishment and conduct of program centers; that the commission would be vitally concerned with the training of qualified teachers on television. The commission would not be involved in the educational content of programmed material, that being an exclusive area of authority of other agencies under the state board of education. But by the word "development" as we understand it today, it is clearly the function of the educational television commission to cause educational television in Florida to expand, to become more available to those who will benefit from its use, to cause educational television as a feature of Florida learning to enlarge, expand and develop.

The legislature has left unchanged the authority to "review and approve all expenditures of public funds by state agencies for the preparation or dissemination of educational television programs. . ." You have not advised me if this aspect of commission activity is in force. But if the commission in the future is to provide the leadership expected of it in the further development of educational television, then the commission may be well advised to work out with the proper state and county officials, charged with the preparation and approval of budgets, the mechanics by which proposed expenditures for educational television program preparation as well as the broadcast functions of disseminating it may be reviewed. Approval or refusal to approve such expenditures by the commission is the key to control of the entire field of development of educational television in Florida.

In the foregoing, I have outlined a general area of legal activity for this commission, but I remind you of two things. First, the law itself does not spell out in detail just what is expected of this commission and what it may legally do. So it must rely for guidance on the discerned intent of the legislature which created it, and upon the policies and philosophy of the state board of education, its parent and controlling body, under the legislature.

Second, the commission has done a remarkable work in the past years of its existence in putting together a workable physical system of broadcasting by which the best thinking of the nation may be channeled to the eyes and ears of most of our people, in and out of

school. But it has ahead of it an uncharted course in developing educational television beyond the physical framework now in operation. The law as written by the legislature does not spell out in any detail where the future course lies. This office cannot give you any more guidelines than were available to the legislature which created the commission. And while these indicate a legislative comprehension of the need for such development, they did not in detail tell you where and how you may proceed.

Therefore these observations should conclude with the suggestion that this commission should proceed with caution in any untried areas of development of educational television, and that the content and kind of planned programs should be coordinated and approved by first the state board of education, its parent state body, and the educational subordinate groups most apt to be affected by the commission's decisions.

066-22—March 17, 1966

PUBLIC LANDS

CONVEYANCE BY FLORIDA INLAND AND NAVIGATION DISTRICT TO TRUSTEES OF INTERNAL IMPROVEMENT FUND, PURSUANT TO §6, CH. 65-900, LAWS OF FLORIDA

To: D. Byron King, Attorney, Florida Inland Navigation District, Jacksonville

QUESTIONS:

1. Is §6, Ch. 65-900, valid authority for the Florida inland navigation district to convey certain lands to the trustees of the internal improvement fund for recreational use, in spite of an existing option to purchase held by a private club?

2. If this land may be conveyed to the trustees under authority of Ch. 65-900, may it legally be used for recreational purposes despite certain restrictions placed on its use?

3. Is a suit for declaratory decree the proper legal method of determining the validity of Ch. 65-900?

For the purpose of this opinion I assume that the facts as stated in your letter are correct. They are as follows:

The tract of land in question which they have been directed to convey is approximately 50.8 acres located in Broward County, Florida, and is generally referred to as the Capone tract. Since 1934 this tract has been held in fee simple by the Board of Commissioners of FIND. In order to secure land for widening the Intracoastal Waterway required by the U. S. FIND entered into an option agreement in June of 1952, with the Boca Raton Club, Inc., whereby FIND gave the Boca Raton Club, Inc., the right of first refusal if and when the Board decided to sell or dispose of the said tract.

Secondly, in order to secure other lands for right-of-way required by the U. S. and to secure permanent access to the aforementioned Capone Tract, FIND executed a declaration of restrictions on the Capone Tract in June 1956. These restrictions were recorded in both Palm Beach County and Broward County. One of the covenants therein restricts construction to single family dwellings, while another as set out in Paragraph 2, provides that the property shall not be used for a park which restrictions were automatically extended for a period of

> 10 years, unless removed in compliance with the conditions set out therein. These conditions have not been met and I think these restrictions are presently in full force and effect.
>
> Section 6 of Ch. 65-900 reads in part as follows:
>
> The Florida Inland Navigation District shall convey for recreational purposes without any consideration therefor, the following described property in Broward County to the Trustees of the Internal Improvement Trust Fund for the use and benefit of the Outdoor Recreational Development Council. . .

And there follows the legal description of the 50.8 acres referred to above.

As to question 1, the Sup. Ct. of Fla., in Holton v. State, 28 Fla. 303, 9 So. 716, established a rule of statutory construction which has survived to this day: "A liberal rule of construction should be applied when the constitutionality of legislative enactments is questioned, and every reasonable doubt should be resolved in favor of the constitutionality of the act assailed."

On the question of whether the legislature may dispose of state-owned lands without the aid of the courts, the Sup. Ct. of Fla., in State *ex rel* Moodie v. Bryan, 50 Fla. 293, 39 So. 929, replied that property which belongs to the state may be disposed of by the legislature without the aid of the courts, this being a legislative prerogative. To the same effect in Brash v. State Tuberculosis Board, 167 So. 827.

However, the Boca Raton Club, Inc., appears to have a valid, subsisting property right in the subject tract. Whether Florida inland navigation district by conveying this tract to another state agency by legislative requirement violates §12 of the Declaration of Rights of the State Const., would involve a constitutional question this office is not authorized to determine.

In answer to question 1, it is my opinion that §6, Ch. 65-900, is valid authority for Florida inland navigation district to convey the subject tract to the trustees of the internal improvement fund, but subject to the possible option rights of Boca Raton Club, Inc.

As to question 2, restated, this question is whether the board had a right to place certain restrictions on the use of the subject land and whether such restrictions apply to another state agency when it receives title to the land.

Pursuant to §2, Ch. 14723, 1931: "Said governing body shall have all powers of a body corporate, including the power to sue and be sued as a corporation, in its name and in any court having jurisdiction; to make contracts; to adopt and use a common seal and to alter the same as deemed expedient; to buy, acquire by condemnation or eminent domain, sell, own, lease and convey, such real estate and personal property as said Board may deem proper to carry out the provisions of this act. . ." This section has not been amended.

We must assume that in 1934 when the land was acquired, it was so acquired pursuant to the terms of the act, and for the public purposes set forth in the act. It has never lost this character, since your letter states that the same is used or reserved for a spoilage area. The board is a state agency, and the property of the board is state property. It became state property at the time of its acquisition.

The option agreement previously referred to was given by the board of commissioners of Florida inland navigation district to Boca Raton Club, Inc., for a valuable consideration. It was given, quoting your letter: "In order to secure land for widening the Intracoastal

Waterway. . ." The option in brief gave the Boca Raton Club, Inc., "the right of first refusal if and when the Board decided to sell or dispose of the said tract." (Again quoting from your letter in reference to the attached instrument itself.)

Then, you state that Florida inland navigation district wished to secure other lands for right-of-way required by the U. S. and to secure permanent access to the subject tract. Florida inland navigation district executed a declaration of restriction on June 26, 1959, and recorded it in the public records of Broward County (copy attached) by which Florida inland navigation district declared it "desires to establish protective covenants encumbering" the subject tract in question here.

The declaration of restriction recites that Arvida Realty Co., had conveyed to Florida inland navigation district an easement through the properties of Arvida to the subject tract, and at the request of Florida inland navigation district, had conveyed two other easements to the United States of America of parcels of land on lake Boca Raton and the intracoastal waterway. Therefore this declaration of restriction covenanted and agreed that the subject land would be restricted as to use of single family residences. Park and recreational areas were restricted to "the convenience and use of the owners or residents" of the subject tract. Further, no "parks for the use of persons other than residents or owners of property within the above-described premises, shall be erected or placed upon any lot or portion thereof nor on any part of the above-described property" meaning the subject tract.

Such restrictions as are contained in the aforementioned declaration "shall not apply to the use by the Board of Commissioners of the Florida Inland Navigation District or the United States of America."

All property in the state is subject to the right of the state to take such property for state purposes, and to take such property freed of any limitation on the use of the property placed there by or for the protection of private persons. This is directly tied with the majority view and the Florida view concerning condemnation and restrictive covenants, and to demonstrate the application of this law to the instant case, we should review it. Perhaps the leading case on the subject in Florida is the case of Board of Public Instruction v. Town of Bay Harbor Islands, Fla., 81 So.2d 637.

In that case, the board of public instruction was trying to acquire property in the town of Bay Harbor Islands for use as a school site, in violation of restrictive covenants contained in certain deeds previously executed by private parties. The Fla. Sup. Ct. had the case for consideration and decision. Justice Drew wrote the opinion, and he and the court followed the Florida and California decisions, which they maintained is the majority and better view, and they quoted extensively from the California cases:

> The courts of California have, however, declined to recognize a building restriction of the character here under consideration as a positive easement or right in the land, but have defined it to be merely a right enforceable in equity as between the parties to the contract, or their successors with notice, and have said that it is in the nature of a negative easement or equitable servitude. (Citing California cases.)

This is the rule in Florida, and the Bay Harbor case so holds.

The declaration of restrictions established protective covenants which Florida inland navigation district declared were to "encumber"

the subject lands. These covenants were given in consideration of the granting of certain easements on lands of Arvida Realty Co., for the convenience of Florida inland navigation district and the United States government. It was stated therein that such covenants were to run with the land.

I have examined the authorities on this subject with care, but find no direct pronouncement of the courts of last resort on the direction question of the standing of such a covenant between a state agency and a private corporation.

Three elements of a real covenant, as defined in Thompson on real property, vol. 7, §3155, are present in this case. These are form, intention of the parties and privity, all set forth clearly in the documents accompanying your letter. The fourth, whether the promise touches or concerns the land, may be subject to several interpretations. The above authority has this to say in §3154:

> A covenant which creates no interest in the land conveyed, but simply deals with its use, is not a covenant running with the land so as to entitle an assignee to take advantage of it. Sjoblom vs. Mark, 103 Minn. 193, 114 N.W. 746, 15 L.R.A. (N.S.) 1129.

Despite the recitation in the declaration of restrictions itself, there may be a question whether this document is a covenant running with the land, or simply is a contract between the board of commissioners of Florida inland navigation district and Arvida Realty Co., Inc.

In answer to question 2, the subject tract may be conveyed to the trustees of the internal improvement fund for the use and benefit of the outdoor recreation development council, but in view of the recorded declaration of restrictions, the trustees of the council should be fully advised that such lands may not be used for general public park purposes, unless and until Arvida Realty Co., Inc., shall give its consent by agreed amendment to the aforementioned declaration of restrictions.

As to question 3, the rights of the Florida inland navigation district under Ch. 65-900 have been defined in the answer to question 1. The Sup. Ct. of Fla., in Rosenhouse v. Spring Term Grand Jury, Fla., 1952, 56 So.2d 445, states the rule as to a declaratory decree as follows:

> . . . The right to utilize our declaratory decree statute does not depend upon the existence of an actual controversy but depends upon whether or not the movant shows that he is in doubt as to the existence or non-existence of some right, status, immunity, power or privilege, that he is entitled to have such doubt removed, and, if circumstances warrant it, obtain appropriate and necessary relief.

Cases are cited in support of this statement. The wording is used by the 3rd Dist. Ct. of App. in Bacon *et al* v. Crespi, Fla., 141 So.2d 823.

Question 3 is answered accordingly, without attempting to discuss the propriety of either the board or the private parties involved using the declaratory decree statute for their individual purposes. This is a policy matter, both for the board and for the other parties.

I hope the foregoing will assist you in resolving the several questions you have raised.

066-23—March 17, 1966

TAXATION

WHOLESALE SALES TAX—BATHING OR SWIMMING CAPS—APPLICABILITY OF §§212.50-212.58, F. S.

To: J. Ed Straughn, Director, State Revenue Commission, Tallahassee

QUESTION:

Are swimming caps and bathing caps, fishing, hunting, camping, swimming or diving equipment within the intention and purview of §§212.50-212.58, F. S., so as to be subject to taxation thereunder?

Sections 212.50-212.58, F. S., impose a wholesale sales and use tax on the fishing, hunting, swimming and diving equipment described in §212.52(3), F. S. Such equipment is defined in said §212.52(3), F. S., as including:

> . . . any device, implement, tool, article or object customarily or primarily used, operated, or consumed by participants in the course of and in the furtherance of the recreational pursuit of fishing, whether in salt or fresh water . . . *hunting*, whether of animals, birds, fowl, fish, reptiles, or other creatures; *camping*, whether independently of or in conjunction with fishing, hunting, swimming or diving; *swimming*, whether in salt or fresh water, or *diving*, whether in salt or fresh water . . . diving tanks, diving masks, diving lungs, diving weights and belts, diving regulators, diving suits, water skis, tow ropes, fins, *bathing and swimming suits*, underwater spears, spear guns, and similar, related or like items . . . articles of clothing or apparel *other than bathing, swimming or diving suits*, shall not be included within this definition. (Emphasis supplied.)

This provision seems to exclude from the operation of the statute "articles of clothing or apparel" other than bathing, swimming, suits. The phrase "other than" has been construed as creating an exception and as being synonymous with the term "except." (30 Words and Phrases, Perm. Ed. 492 and 493; 67 C.J.S. 532, note 80 subsection (10); 32 C.J.S. 1150, note 66; 46 C.J. 1151, note 64). The effect of the statutory provisions is to exempt from the operation of the statute "articles of clothing" except "bathing, swimming and diving suits," which are left subject to taxation notwithstanding they may fall under the general classification of "articles of clothing or apparel." *Diving suits* are used under two classifications in said §212.52(3), F. S.; first, in the phrase, "diving tanks, diving masks, diving lungs, diving weights and belts, diving regulators, diving suits;" and second, in the phrase, "water skis, tow ropes, fins, bathing and swimming suits," each of said phrases being followed by the phrase "underwater spears, spear guns and similar, related or like items," which might be applicable to each of the two classifications first mentioned. The phrase "diving tanks, diving masks, diving lungs, diving weights and belts, diving regulators and diving suits," may well have reference to diving with a controlled air supply, while the reference to "water skis, tow ropes, fins, bathing and swimming suits" may refer to water sports without a controlled air supply, such as swimming, diving and similar water sports.

The reference in the statute to "water skis, tow ropes, fins, bathing

and swimming suits," refers to equipment usually used without a controlled air supply, and refers to water sports usually carried on in or near public or private beaches. The reference to "bathing and swimming suits" refers to the bathing and swimming suits in use at private and public beaches, and which are usually used without a controlled air supply. The reference to devices, implements, tools, articles and objects "customarily or primarily used, operated, or consumed by participants in the course of and in the furtherance of the recreational pursuit of . . . swimming (as well as diving done in connection with swimming or as a sport), whether in salt or fresh water," appears to relate to "devices, implements, tools, articles and objects" used for swimming and diving. Any "device, implement, tool, article or object" customarily or primarily used in swimming or diving in public or private waters would appear to be within the purview and intention of said §212.52(3), F. S., and is subject to taxation under §§212.50-212.58, F. S.

Swimming caps and bathing caps used customarily or primarily for swimming or diving, or both, in private or public waters in this state, would appear to be "any device, implement, tool, article or object customarily or primarily used, operated or consumed in the course of and in the furtherance of the recreational pursuit of . . . swimming . . . or diving, whether in salt or fresh water," and subject to taxation under said §§212.50-212.58, F. S. This statute does not require that the particular swimming or bathing cap be used for such purposes, only that it be of a type "used customarily or primarily" for such purpose or purposes. If it be of a type not used customarily or primarily for such purposes then it is not subject to taxation as aforesaid. The fact that some swimming or bathing caps are not purchased or will not be used for bathing or swimming purposes in private or public waters would not appear to be a bar against their taxation, where enforcement against sales actually not used for a taxable purpose would present difficult and major problems of tax enforcement. Such an example would be caps so designed as to be used either for a common taxable, as well as a common nontaxable purpose, so that its classification at time of sale would present major problems of tax enforcement as well as problems of tax evasion.

Statutes prohibiting the possession and sale of fish brought into a state by interstate commerce from another state, although lawfully caught and possessed in such other state, have been upheld as necessary for the enforcement of the local fish regulations (36A C.J. 547, §29; 22 Am. Jur. 697-698, §42). "If the substantial and fundamental rights of the taxpayer are protected, any means adopted by the legislature for the collection and enforcement of taxes will be held not to deny due process of law." (16A C.J.S. 978, §650). "Statutes requiring licenses of, or imposing license or privilege taxes on, all persons embraced in a class, based on a classification conforming to natural and reasonable lines of distinction, are valid." (16 C.J.S. 287, §498).

The legislative classification of "any device, implement, tool, or object customarily or primarily used, operated or consumed by participants in the course of and in the furtherance of the recreational pursuit of . . . swimming . . . or diving, whether in salt or fresh water," appears to be a proper and legal classification for purposes of taxation. If "swimming caps and bathing caps" may be classified as "any device, implement, tool or object customarily or primarily used, operated or consumed by participants" in the recreational pursuit of swimming or diving, then such caps are within the purview and intention of §§212.50-212.58, F. S., and subject to taxation thereunder, otherwise not. Bathing, swimming and diving suits, at least when suitable for such purposes,

appear to be taxable items irrespective of their actual use, and should not be deemed articles of clothing or apparel and tax exempt. Swimming and bathing caps "customarily or primarily used" in the course of and in the recreational pursuit of swimming or diving, if part and parcel of a bathing or swimming suit, especially when bought and used as a component part thereof, would appear to be taxable; however, if not so customarily or primarily used, or not a part of a swimming or diving suit as aforesaid, they would not appear to be taxable items. Their customary and primary use seems to be a controlling fact in determining whether they are taxable or not.

This leads to the conclusion that swimming and bathing caps customarily or primarily used in the recreational pursuit of swimming or diving in salt or fresh water are subject to taxation when they are a component part of a swimming or diving suit. Shower caps and similar caps used for hygienic bathing are not customarily or primarily used in the recreational pursuit of swimming or diving and are exempt from taxation under §§212.50-212.58, F. S.

066-24—March 18, 1966

COUNTY SCHOOL SYSTEM

INSTRUCTIONAL PERSONNEL—PERSONAL LEAVE, PROFESSIONAL LEAVE

To: Floyd T. Christian, Superintendent of Public Instruction, Tallahassee

QUESTION:

> **Can the board of public instruction grant personal leave to a teacher to attend the state legislative session as an elected state representative and further, can he be compensated by the board of public instruction during the leave?**

Florida law does not prohibit a member of the legislature from accepting employment as a teacher.

The conditions under which a teacher may be granted leave with pay are established by state law.

Section 231.43, F. S., provides:

> *Personal leave.*—The county board of each county shall adopt regulations prescribing conditions under which members of the instructional staff shall be granted leave of absence for personal reasons. Any such leave of absence shall be approved by the county superintendent, subject to regulations of the county board. *Any member of the instructional staff who is absent for personal reasons shall not be entitled to pay while absent.* (Emphasis supplied.)

You will note that the act specifically states that teachers absent for personal reasons shall not be entitled to pay while absent.

It would appear clear therefore, that personal leave could be granted by a local school board to a teacher to attend a legislative session as a member of the legislature provided the board complies with the conditions set forth in §231.43, F. S., but that the act prohibits the board from paying compensation to the teacher while absent from teaching duties on personal leave. It should be noted however that "professional leave" may be granted by a county board of public instruction at its discretion if such leave is in accord with the local school board and state board of education regulations (See §231.42, F. S.). Compensation can be legally

paid to a teacher when absent on professional leave since there is no statutory prohibition as in the case of personal leave.

This opinion does not undertake to define professional leave since that is the duty of the county and state boards of education.

066-25—March 18, 1966

TAXATION

INTANGIBLE PERSONAL PROPERTY—CONSTRUCTION OF §199.022(3), F. S.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. Are existing notes and obligations acquired prior to Jan. 1, 1966, secured by out-of-state mortgages, subject to the 2 mills Class C intangible tax or is it only those notes and obligations that have been acquired since Jan. 1, 1966?

2. Are notes and obligations secured by mortgages out-of-state subject to recording and the payment of documentary stamps and the recording fee, or are they subject only to the Class C-2, 2 mills tax?

3. Will the out-of-state mortgages that we have previously assessed as Class D intangible property be subject to the Class C-2 on the unpaid balance?

These questions arise by reason of the general revision of the intangible personal property statutes of Florida made by Ch. 65-389, and especially subsection (3) of §2 thereof and subsection (3) of §14 thereof, which now appear as §199.141(3), F. S., 1965. Further reference to the statutes will be to said Florida Statutes, 1965.

Prior to the enactment of said Ch. 65-389 (Ch. 199, F. S.), Class C intangible personal property embraced substantially what is now referred to as Class C-1 intangible personal property and was classified as Class C intangible personal property under former §199.02(3), F. S., 1963, the same being the intangible personal property embraced within the proviso in §1, Art. IX, State Const., as amended at the general election in 1944. Class C-2 intangible personal property, as presently included in said §199.022(3), F. S., 1965, was included in §199.02(4), F. S., 1963, and was subject to an annual intangible tax in the amount provided by §199.11(4), F. S., 1963. We are here concerned primarily with said Class C-2 intangible personal property as mentioned in §199.022(3)(b), F. S., 1965.

Said Class C-2 intangible personal property consists of "all notes, bonds and other obligations secured by mortgage, deed of trust or other lien on real property," subject, however, to the proviso therein allocating the security for purposes of said §199.022(3)(b), F. S. This type of intangible was subject to an annual ad valorem tax under §199.11, F. S., 1963, while under present §199.141, F. S., it is subject to 2 mills on the dollar of the just valuation. It is clear that the changes made in the 1965 revision of the intangible personal property taxing statutes of Florida were to place notes, bonds and other obligations secured by mortgage, deed of trust and other lien on real property in other states on a par with like obligations secured by mortgage, deed of trust or other lien on real property in Florida. Chapter 65-389, under the provisions of §39 thereof, became "effective on January 1, 1966." There is no doubt but that said Class C-2 intangible personal property taxes became applicable

to notes, bonds and other obligations secured by mortgage, deed of trust or other lien on lands located in other states, when such notes, bonds or obligations, secured as aforesaid, when brought into this state after Jan. 1, 1966. These are controlled by the said 1965 revision of Ch. 199, F. S., 1965.

We come next to the application of the said 1965 revision to notes, bonds and other obligations having a tax situs in Florida on the effective date of said Ch. 65-389, that is, Jan. 1, 1966. Since there is nothing in said Ch. 65-389, now appearing as Ch. 199, F. S., 1965, providing that said chapter shall have no application to such notes, bonds and other obligations, it is clear that after said Jan. 1, 1966, said Ch. 65-389, now appearing as Ch. 199, F. S., 1965, must be held to be applicable to such securities brought into this state prior to said Jan. 1, 1966.

The last above conclusion seems to pose the question of whether or not, where such notes, bonds and other obligations were subject to taxation under Ch. 199, F. S., 1963, and prior statutes, and Class D intangible personal property taxes were paid on such intangibles for the tax year of 1965, or prior tax years, the taxes so paid should be credited on the 1966 taxes so as to reduce the taxes that would otherwise be payable under Class C-2 intangible tax classification under the 1965 revision. Such taxes for 1965 and prior years, paid under Class D intangible personal property, were assessed and collected under valid and existing statutes and were paid under valid and existing statutes and laws. "A tax is not a debt in the ordinary sense. It is not predicated on contract. It is a burden imposed by the sovereign power through duly accredited representatives for the support of the government." (Kathleen Citrus Land Co. v. City of Lakeland, 124 Fla. 659, 169 So. 356, text 358).

Finding no provision in the existing law for allowing a credit for the taxes paid, or which accrued and were payable, prior to Jan. 1, 1966, and finding no statute or law authorizing the refund of such paid or accrued taxes, we must hold that they may not be credited on taxes assessed and accruing after Dec. 31, 1965, under said Ch. 199, F. S., 1965.

Although the proviso in §1, Art. IX, State Const., and §199.022-(3)(a), and §199.141(3)(a)-(d), F. S., clearly contemplate, if not require, the recording of mortgages, deeds of trust and other liens encumbering lands in Florida, we find no direct requirement in said constitutional provision or said §§199.022 and 199.141, F. S., requiring that the mortgages, deeds of trust or other liens encumbering lands in other states be recorded in the mortgage or other records in the state or any county thereof. As the recording of mortgages, deeds of trust and other liens encumbering real property, is designed primarily, if not entirely, for the giving of constructive notice to persons dealing, or which might deal, in such lands, we see no real benefit to any of the parties involved by the recording of a mortgage, deed of trust or other lien encumbering lands in another state or country, but not any lands in this state, in a mortgage or lien record in this state, or in any other public record. We find nothing in said Ch. 199, F. S., 1965, or elsewhere, specifically requiring that such mortgages, deeds of trust or other liens be recorded in any record book in Florida.

Questions 1, 2, and 3 are answered as follows:

1. Notes, bonds and other obligations, secured by mortgage, deed of trust, or other lien encumbering lands in other states, having a tax situs in this state, on Jan. 1, 1966, come under Classification C-2 intangible personal property, and are subject to classification as Class C-2 intangible personal property, and subject to taxation under that classification for the tax year of 1966 and are subject to the 2 mill single tax provided for in §199.141(3)(e), F. S. Taxes previously paid under the

classification of Class D intangible personal property, may not be credited on or to reduce the 1966 tax imposed under said Ch. 199, F. S., 1965.

2. Such notes, bonds and other obligations secured by mortgage, deed of trust or other lien on real property located in other states, are not subject to recordation in this state, so there will be no recording fee. The liability for documentary stamps must be determined from the application of Ch. 201, F. S., and no general rule may be here provided for determining documentary stamp tax liability depends largely upon applicable facts and circumstances.

3. Notes, bonds and other obligations, having a tax situs in Florida, which are secured by mortgage, deed of trust or other lien on lands in other states, which had a tax situs in Florida, so as to subject them to taxation in 1965 or prior tax years, will be subject to Class C-2 intangible personal property if their situs was in Florida on Jan. 1, 1966, and will be subject to taxation as such Class C-2 for a 2 mill tax, with no credit being given thereon for taxes previously paid as Class D intangible personal property taxes.

066-26—March 18, 1966

COUNTY ORGANIZATION, OFFICERS, ETC.

AUTHORITY TO PLAN COUNTY-WIDE WATER OR SEWER SYSTEMS—USE OF FEDERAL FUNDS

To: Sidney Martin, President, State Association of County Commissioners, Hawthorne

QUESTION:

Are the boards of county commissioners of the several counties authorized to develop a comprehensive plan for the construction of county-wide water and sewer systems as contemplated by the consolidated farmers home administration act of 1961, as amended by Pub. Law 89-240, 79 Stat. 931 (known as the Aiken-Poage Act), 7 U.S.C.A. 1926 et seq. (1965 Cum. Annual Pocket Part) and may the counties accept and use federal grant funds to pay for all or a portion of such plan?

FHA Instruction 442.7, dated Dec. 20, 1965, distributed by the U. S. department of agriculture, pertaining to grants for preparation of comprehensive area plans for water and sewer systems, submitted with your inquiry, has been examined in detail. The provisions of §§153.03(4) and 153.04, F. S., authorize the several counties to undertake the construction of water and sewer systems in the unincorporated areas of the county. Such systems may, with permission of affected municipalities, be constructed within municipal boundaries.

Section 153.03(4), F. S., contemplates and authorizes the planning of such water and sewer systems in the county. Federal funds necessary for planning such systems could be accepted by the counties and used for that purpose.

Chapter 153, F. S., the enabling legislation authorizing construction and operation of water and sewer systems by counties on a county-wide basis, and, under some circumstances, in districts less than county-wide, does not appear to permit regulation of water and sewer systems of municipalities or such systems developed by private individuals on their lands, those facilities being subject to the jurisdiction of the state board of health under the provisions of Ch. 381, F. S.

It is my opinion that under the provisions of Ch. 153, F. S., the boards of county commissioners of the several counties of Florida would be authorized to develop a comprehensive plan for the construction of county-wide water and sewer systems and that the respective counties would be authorized to accept and use federal grant funds made available for these purposes.

Your question is therefore answered in the affirmative.

066-27—March 18, 1966

TAXATION

TAX COLLECTOR—AUTHORITY TO ENFORCE THE COLLECTION OF DELINQUENT TANGIBLE PERSONAL PROPERTY TAXES

To: James C. Robinson, County Attorney, Orlando

QUESTIONS:

1. Can the county tax collector, pursuant to his warrant, forcibly gain entrance to a taxpayer's home for the purpose of seizing personal property therein for the payment of delinquent tangible personal property taxes?

2. Can a county tax collector, pursuant to his warrant, without the institution of a suit and in the absence of existing litigation, obtain an order of court, similar to a writ of assistance, to allow him or the sheriff to forcibly gain entrance to a taxpayer's home for the purpose of seizing personal property therein for payment of delinquent tangible personal property taxes?

3. Can a common law foreclosure suit be instituted by the county tax collector against the taxpayer and his personal property for the enforcement of a tax lien resulting from delinquent tangible personal property taxes?

These questions will be considered in order.

Initially it should be noted that while §192.21, F. S., makes taxes imposed pursuant to the constitution and the laws of Florida a first lien on any property against which such taxes have been assessed, §200.02, F. S., states that tangible personal property taxes shall be a lien on all the personal property of the taxpayer in the county in which they are assessed from Jan. 1, for which year the property is liable for assessment.

Section 200.27, F. S., where relevant, states:

> Taxes on tangible personal property shall be deemed delinquent on April 1 of the year following that for which the assessment was made . . . On or before April 25 . . . the tax collector shall advertise one time in some newspaper published in the county . . . or if there be no such newspaper, a newspaper published for a less period of time may be selected, a notice setting forth the names of delinquent personal property taxpayers and the amount of tax due by each . . . and that unless such delinquent tangible personal property taxes are paid before May 1 . . . warrants will issue thereon *directing levy upon and seizure of* the tangible personal property of the taxpayer for unpaid taxes; . . . Beginning on May 1 . . . the *tax collector in person or by deputy appointed by him for that purpose shall levy upon and seize tangible personal property of the*

> *delinquent taxpayer for unpaid taxes*, and a written appointment from the tax collector with a statement from him of the person in whose name the property is assessed and the amount of taxes due *shall be sufficient warrant and authority for the tax collector or said deputy to act*, and it shall not be necessary for the tax collector or said deputy to take the tax roll or warrant annexed thereto with him. (Emphasis supplied.)

Initially it is noted that there is no Florida statute relating to collection of taxes similar to §78.10, F. S., which allows a sheriff when executing the writ of replevin in a situation where property is concealed in any dwelling house or other building or enclosure, and after a proper demand by the sheriff and failure to deliver by the occupant, to cause such house, building or enclosure to be broken open.

Since the legislature has failed to provide such a provision for tax collectors when making execution and levy as provided in §200.27, F. S., we must look to the common law on the subject.

In 21 Am. Jur., p. 70, and the annotation at p. 57 A.L.R., beginning at p. 210, contain excellent discussions concerning the "right of officer to break into building to levy under execution." In 57 A.L.R., p. 210, and continuing on to p. 211, it is stated:

> The common law, both in England and America, jealous of intrusion on domestic peace and security, regards every man's house as his castle and fortress, as well for his defense against injury and violence, as for his repose. It is this ancient and well known principle that underlies the whole law of the right to break and enter a dwelling house to serve a *civil writ or process*. Accordingly, therefore, the authorities are substantially agreed that, as a general rule, in the absence of statute, the outer door or other outside protection to a dwelling house may not, even after request and refusal of admittance, be broken or forcibly entered for the purpose of levying under a writ of execution. (Emphasis supplied.)

Further therein at p. 211 it is stated:

> And all the said books which prove that, *when the process concerns the King*, that the sheriff may break the house, imply that at the suit of the party the house may not be broken; otherwise the addition (at the suit of the King) would be frivolous. And with this resolution agrees the book in 13 Edw. LV. 9, and the *express difference* there taken between the *case of felony*, which (as has been said) *concerns the commonwealth*, . . . (Emphasis supplied.)

The basis for the above and foregoing distinction appears to be that there the intrusion is justified in order to prevent the possibility of a greater wrong, for instance, felony, or similar criminal act, while in the furtherance of a service of a civil process no such justification for perpetuating a breach of the peace and a violation of an individual's right to the privacy of his home and freedom from intrusion therein exists.

We are of the opinion that the levy and execution thereon by a tax collector pursuant to statutory authority does not provide sufficient justification for warranting a forcible intrusion into a man's home for the taking of personal property located therein. Should an officer enter without the necessary permission, he would be constituted a trespasser *ab initio*. Consequently, any levy and execution done thereafter would be void. In this respect, see p. 212 of the aforementioned A.L.R. annotation. It also contains a thorough discussion of what constitutes outer doors as

opposed to inner doors, and an entry into buildings other than the dwelling. This appears to answer question 1.

Questions 2 and 3 will be considered simultaneously.

Black's law dictionary, deluxe edition, at p. 1859 contains several definitions of a writ of assistance. It could be considered as a form of process issued by a court of equity to transfer the possession of lands, the title or right of possession to which it has previously adjudicated, as a means of enforcement of its decree instead of turning the party over to a court of law to recover such possession. It performs the same office in a suit in equity as an execution in an action at law, being nothing more than the process by which the court of equity finally carries its judgment or decree into effect. (4 Am. Jur., p. 440.)

Note that the writ of assistance issues as an incident to a prior decision rendered in a court in equity. In this respect, it should be remembered that delinquent personal property taxes become only a lien on the taxpayer's personal property. Title is not vested in the state. Although there is some authority for the proposition that the writ of assistance may issue in cases involving personal property, generally the writ issues only in cases involving real property. In the absence of any Florida cases expressly allowing the writ to issue in cases involving personal property, this office must advise that it would be extremely doubtful that the writ would issue in such cases.

For an excellent discussion of the writ of assistance, please refer to the case of Southern State Bank v. Leverette, 123 S.E. 68, and the cases which follow said case, to-wit: Wake County v. Johnson, 174 S.E. 303; Hill v. Connecticut General Life Ins. Co., 176 S.E. 269; Gower v. Town of Clayton, 199 S.E. 77; Robertson v. Robertson, 116 S.E.2d 849; Hill v. Resort Development Co., 110 S.E.2d 470; and Knott Warehouse Co. v. Willis, 149 S.E. 679.

Question 3 is answered in the affirmative with the qualification that the foreclosure should be by a suit in equity. In the case of Brickell *et al* v. Palbicke, 167 So. 44, it is stated:

> That the lien evidenced by valid tax sales certificates is of such character that it may be enforced by foreclosure without the aid of statutory provisions particularly authorizing and fixing the procedure for such foreclosure is established in this jurisdiction by the opinion and judgment in the case of First Trust & Savings Bank v. West Lake Inv. Co., 105 Fla. 590, 141 So. 894, 895.

In Southern Attractions, Inc. v. Grau (Fla.), 93 So.2d 120, 124, it is stated:

> Where the statute creates a lien but no adequate or exclusive remedy is provided for, enforcement in equity may generally be resorted to. Milton v. City of Marianna, 1932, 107 Fla. 251, 144 So. 400. Foreclosure of Liens is a matter of equitable cognizance within the jurisdiction of the circuit courts under art. 5, Sec. 11, Fla. Constitution, F.S.A. Brickell v. Palbicke, 1936, 123 Fla. 508, 167 So. 44.

In connection with that which is stated in the sections previously cited, see §62.36, F. S., which states:

> All liens of any kind, whether created by statute or the common law, and whether heretofore regarded as merely possessory or not, may be enforced by proceedings in chancery.

Also see Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926), and the First Trust & Savings Bank case previously mentioned.

Since your questions are of particular significance to the effective

administration of the collection of taxes by the state, we took the liberty of examining other possible remedies where a taxpayer refuses to open his home and deliver personal property to the tax collector upon proper demand. Although Florida follows the rule that a tax is not a debt and even though a creditor's bill is usually based on a debtor-creditor relationship, it may possibly be that in a proper situation where all legal remedies have been exhausted, a court of equity might allow a creditor's bill to lie to assist in the collection of delinquent taxes. In this respect, see Vol. 3, Cooley on Taxation, 4th Ed., p. 2681; Darnell *et al* v. State, 90 N.E. 769; and Murphy v. Jos. Hollander (N. J., 1943), 34 A.2d 780. The last-mentioned case also discusses the remedy of mandamus. In connection with use of a creditor's bill, see §62.37, F. S.

In considering a creditor's bill, you might refer to Sherman County v. Alden, 148 P.2d 509, 152 A.L.R. 881; People v. Ballerino *et al*, 34 P. 330; Montezuma Valley Water Supply Co. *et al* v. Bell, 36 P. 1102; Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co. *et al*, 46 F. 584; 21 Am. Jur. 2d, beginning at §9 through §17; Bouvier's law dictionary, Rawle's 3rd Rev., Vol. I, p. 726; State v. Meyer *et al*, 6 So. 590; and Kooman's Florida Chancery Pleading and Practice, 1958 Cumulative Supplement, p. 222.

In connection with the enforcement of equity decrees, see F.R.C.P. 3.15. The utilization of any court would provide the additional judicial remedy of contempt should one fail to obey a proper order of the court.

Section 196.08, F. S., which relates to certain procedure when a county, city, village or town of the state is maintaining tax lien foreclosure proceedings in equity, may be of significance to you in relation to questions 2 and 3.

066-28—March 21, 1966

CITRUS COMMISSION

EMPLOYEES—PREMIUM PAYMENTS FOR INSURANCE, HEALTH, ACCIDENT AND LIFE—CONSTRUCTION OF CH. 65-65, LAWS OF FLORIDA (§601.10, F. S.), AND §282.021(5), F. S.

To: Wallace Henderson, Director, State Budget Commission, Tallahassee

QUESTION:

May the Florida citrus commission pay, or participate in the payment of premiums for health, accident and life insurance for its full time employees, pursuant to such rules and regulations as the said commission may adopt, as provided in Ch. 65-65 (§601.10, F. S.), without first obtaining the approval of the budget commission?

Section 601.10, F. S., sets out the powers of the Florida citrus commission generally, including the powers and authority mentioned in subsection (3) thereof, as amended by Ch. 65-65, which subsection as amended provides in part that: "The commission may pay, or participate in the payment of, premiums for health, accident and life insurance for its full-time employees, pursuant to such rules or regulations as it may adopt, and said payments or participation payments *shall be in addition to* the regular salaries of such full-time employees." (Emphasis supplied.) This addition to said §601.10(3), F. S., appears to have been covered in the title to the act which appears to be in conformity with the requirements of §16, Art. III, State Const. This

chapter appears to have taken effect upon the approval by the governor on May 13, 1965.

Section 601.28, F. S., imposes an inspection fee upon the classes of citrus fruit therein mentioned, in the amounts therein specified, which inspection fees, when collected "shall be paid into the state treasury" to be kept in a fund designated as "the general inspection trust fund," which moneys "are appropriated and made available for defraying the expenses of the Commission and of the administration and enforcement of all provisions" of Ch. 601, F. S. "An appropriation of money is the setting it apart officially out of public revenue for a special use or purpose, in such manner that the executive officers of the government will have authority to withdraw and use the money, and no more, for that object and for no other." (State v. Lee, 121 Fla. 360, 163 So. 859, text 868; State v. Allen, 83 Fla. 214, 91 So. 104, text 105 and 106; 6 C.J.S. 123 and 124; 3A Words and Phrases, Perm. Ed. 467-469; and 42 Am. Jur. 747, §43). The above-quoted provision from §601.28, F. S., constitutes an appropriation of funds derived from citrus inspection fees "for defraying the expenses of the commission" and its administration of the citrus laws and statutes administered by it. The provision in §601.10(3), F. S., as amended by Ch. 65-65, that: "The Commission *may* pay, or participate in the payment of, premiums for health, accident and life insurance for its full time employees," (Emphasis supplied.) appears to be a conditional appropriation from inspection fees paid into the general inspection fund in the state treasury should the commission elect to pay or participate in the payment of premiums for health, accident and life insurance for its full time employees as authorized by §610.10(3), F. S., as amended by Ch. 65-65. The use of the word "may" in said subsection, as amended, indicates a permissive and not a mandatory power. In addition to the use of the word "may" in said §610.10(3), F. S., as amended, it appears that before the commission may pay or participate in the payment of insurance premiums as aforesaid it must do so "pursuant to such rules and regulations as it may adopt." From this it seems that the making and adoption of rules and regulations may be a condition precedent to application of said §601.10, F. S.

The contention, we are advised, has been made that the payment of health, accident and life insurance, in whole or in part by the commission would constitute perquisites within the purview of §282.021-(5), F. S., which provides that: "Those things, or the use thereof, or services of a kind which confer on the officers or employees receiving same, some benefit that is in the nature of additional compensation, or which reduces to some extent the normal personal expenses of the officer or employee receiving the same, and shall include but not be limited to such things as quarters, subsistence, utilities, laundry services, medical service, use of state owned vehicles for other than state purposes, servants paid by the state, or other similar things." shall be deemed "perquisites." See also definition of "perquisite" in 32 Words and Phrases, Perm. Ed. 275-278. Section 282.051(3)(f), F. S., as amended by Ch. 65-367, provides that: "No perquisites shall be furnished by the state, unless approved by the budget commission during each biennium. Whenever the state is to furnish those things defined as perquisites in §282.021(5), the budget commission shall approve the kind and monetary value of such before the same may be furnished by any agency."

Reference is made here to §601.05, F. S., which provides that:

> The Florida citrus commission shall be a body corporate and shall have power to contract and be contracted with, and

> shall have and possess all of the powers of a body corporate for all purposes necessary for fully carrying out the provisions and requirements of this chapter. The said commission shall adopt a corporate seal with which it shall authenticate its proceedings.

The Florida citrus commission acts in the nature of a board of directors for the said body corporate. The general powers of the commission are set out in §601.10, F. S. The said commission is vested with many other powers and duties (see §§601.11, 601.111, 601.12, etc., F. S.). Section 601.28, F. S., 1965 as amended by Ch. 65-2442, imposes inspection fees upon the citrus fruits and products mentioned therein. Under §601.30, F. S., such inspection fees, when collected, are paid into the state treasury to the credit of the "general inspection trust fund . . . made available for defraying the *expenses of the commission* and of the administration and enforcement of all provisions of" Ch. 601, F. S. (Emphasis supplied.)

The Florida citrus commission is clearly a public corporation, that is, one created by the state for political purposes and to act as an agency of the state in the administration of the statutes, laws, rules and regulations affecting the citrus industry in Florida. (Black's law dictionary, 4th Ed. 409; 35 Words and Phrases, Perm. Ed. 120-139; C.J.S. 394-396, §18; 18 Am. Jur. 553-555, §8; 7 Fla. Jur. 352-353, §3; Forbes Pioneer Boat Line v. Board of Commissioners, 77 Fla. 742; 82 So. 346, text 350). The Florida citrus commission is neither an officer nor an employee of the state or an agency of it, but is an agency of the state within itself and is authorized to operate in the nature of a corporation. The Florida citrus commission is the said corporation's board of directors.

Section 601.30, F. S., appropriates the funds derived from inspection fees imposed by Ch. 601, F. S., on citrus fruits produced in Florida defraying the expenses of the Florida citrus commission and the administration and enforcement of the citrus statutes and laws of Florida, primarily Ch. 601, F. S., as amended. Said Ch. 601, F. S., is in the nature of a continuing appropriation. The provision in Ch. 65-65 authorizing the Florida citrus commission to "pay or participate in the payment of premiums for health, accident and life insurance for its full time employees, pursuant to such rules and regulations as it may adopt," when read in conjunction to and with said §601.30, F. S., clearly indicates a legislative intent to appropriate such funds to the payment of such premiums. There was an appropriation by Ch. 65-65, from the funds in the state treasury, under and pursuant to §601.30, F. S., for the payments of such premiums; provided the requirements of §216.17, F. S., are complied with. Although the payment of the insurance premiums may be in the nature of perquisites, they have been specifically provided for and authorized by said Ch. 65-65, which provision does not appear to be in conflict with §112.12, F. S. as amended by Ch. 65-538. Thus, the authority to initially determine whether such insurance premiums should be paid is vested in the Florida citrus commission, and not in the state budget board.

However, §216.17, F. S., provides that:

> Immediately before the beginning of each fiscal year, the state budget commission shall require the head of each spending agency to submit on forms prescribed by the state budget commission, a work program for the budget year, which program shall include all appropriations for operation and all anticipated revenue and receipts, and maintenance expenditures and

> for the acquisition of property, and it shall show the requested allotments of said appropriations for such spending agency for the ensuing year.

which requirements embrace expenditures under Ch. 65-65 (§601.10, F. S.). The above annual budgets are under said §216.17(2), (3), F. S., subject to quarterly changes or emergency provisions, which would seem to extend to budget changes made necessary by statutes enacted during a budget period. These budgets and budget changes require budget commission approval before expenditures may be made thereunder. The approval by the state budget commission of an annual budget, or a budget change under said §216.17, F. S., would appear to be sufficient as commission approval thereof, under §282.051(3)(f), F. S., only when expenditures for health, accident and life insurance specifically appear on the face of said agency's budget and such expenditures have been expressly authorized pursuant to requirements of current operating budget instructions.

Your question is, therefore, answered in the negative.

066-29—March 23, 1966

COUNTY SCHOOL SYSTEM

BONDED VICE-CHAIRMAN OF SCHOOL BOARD—AUTHORITY TO SIGN WARRANTS AND LEGAL DOCUMENTS

To: Floyd T. Christian, Superintendent of Public Instruction, Tallahassee

QUESTION:

> **If the vice-chairman of the county board is properly bonded as provided in §237.31(2), F. S., under what condition may he sign school warrants and other legal documents?**

Section 230.15, F. S., provides, inter alia, that the county board "may elect a vice-chairman." Section 237.31(2), F. S., includes a provision that "the chairman and vice-chairman of the (county) board shall be required to give bond. . ."

Section 237.32(3), F. S., includes the following provision:

> Each check or warrant (drawn on authority of the county board, as prescribed in the school code) shall be signed by the chairman of the county board. . .; provided, . . . that the county board may by resolution, a copy of which must be delivered to the depository, provide for internal funds to be withdrawn from any county depository, by a check duly signed by at least two bonded school employees designated by the board to be responsible for such account or accounts.

There appears to be no provision in the school code specifically prescribing the duties and responsibilities of a county board vice-chairman. From this it would seem to follow that such a vice-chairman would have no official powers or duties except in the absence or incapacity of the duly elected chairman, in which case he would temporarily assume the duties and responsibilities of the chairman until the return of the chairman or until the "next ensuing regular or special meeting" when the county board would be required to elect a chairman, as provided in §230.15, F. S.

Your question is answered accordingly as follows:

I am of the opinion that there are no conditions under which a vice-chairman of a county board as such may sign school war-

rants or other school documents, except when he is required to and does assume the duties of the chairman, in which case he would be legally empowered to sign such school warrants and other legal documents as the chairman would be legally empowered to sign.

066-30—March 23, 1966

INSTITUTIONS OF HIGHER LEARNING

DISCIPLINARY PROCEEDINGS OF UNIVERSITIES ADMINISTRATIVE IN NATURE—NOT CRIMINAL

To: W. G. Hendricks, Business Manager, Board of Regents, Tallahassee

QUESTION:

> **Does the student body of Florida state university have legal authority to adopt the following proviso in its proposed bill of rights: "The university shall not prosecute or punish for the same case any student whose case is processed in any way by local, state, or federal courts?"**

Under Florida constitutional and statutory law the state universities are under the general control and direction of the state board of education (§3, Art. XII, State Const.) and under the direct management of the state board of regents subject to the general supervision of the state board of education (§§240.001, 240.042, F. S.).

The state legislature has not delegated to student body organizations any authority to enact regulations, constitutions, bills of rights or administrative procedures which would restrict or in any way supersede the authority and responsibilities of the legislature, the board of regents and the administrative heads of the respective universities.

The proposed bill of rights would therefore be a legal nullity without force and effect.

It should also be pointed out that the question of the federal and state constitutional prohibitions against double jeopardy in criminal proceedings is not relevant to the proposed student body bill of rights which would attempt to restrict universities from prosecuting or punishing "for the same case any student whose case *is processed in any way* by local, state, or federal courts" (Emphasis supplied.)

> A city ordinance prohibiting acts made penal by the State laws when perpetrated within the municipal limits is not void, though it prescribes the same penalty as the State law for such offenses; and a trial under the ordinance will not bar a trial under the State law. Theisen v. McDavid, 34 Fla. 440, 16 So. 321, 26 L.R.A. 234. (25 F.S.A. 605)
>
> Generally, to constitute a proper basis for claim of former jeopardy a proceeding must be valid and if proceedings are lacking in any fundamental prerequisite which renders judgment void they will not constitute a proper predicate for claim of former jeopardy. Tilghman v. Mayo, 82 So.2d 136.
>
> Double jeopardy applies to the offense, not the act causing the criminal offense. McHugh v. State, 160 Fla. 823, 36 So.2d 786, certiorari denied 69 S. Ct. 640, 336 U.S. 918, 93 L. Ed. 1081.
>
> In order to sustain plea of former jeopardy it must be made to appear that there was a former prosecution in the

same state for the same offense, that same person was in jeopardy on the first prosecution, that the parties are identical in the same prosecution, and that the particular offense on the prosecution of which jeopardy attached was such an offense as would constitute a bar to further prosecution. State v. Bowden, 154 Fla. 511, 18 So.2d 478.

The universities have no legal authority to prosecute students. Prosecution in a legal sense necessarily requires proceedings in a court of competent jurisdiction. The universities are not authorized to operate courts.

PROSECUTION. In criminal law. A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime. See United States v. Reisinger, 128 U.S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480; Tennessee v. Davis, 100 U.S. 257, 25 L. Ed. 648; Schulte v. Keokuk County, 74 Iowa, 292, 37 N.W. 376; Sigsbee v. State, 43 Fla. 524, 30 So. 816; People v. Ellis, 204 Mich. 157, 169 N.W. 930, 931. The continuous following up, through instrumentalities created by law, of a person accused of a public offense with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused. Davenport v. State, 20 Okl. Cr. 253, 202 P. 18, 24. (Black's Law Dictionary, Third Edition, p. 1451)

The board of regents is authorized by statute to adopt rules and regulations governing traffic on state university campus (§§239.54, 239.55, 239.56, 239.57, 239.58, F. S.). The municipal court of the adjacent municipality is granted jurisdiction for the trial of all persons violating said rules and regulations.

Proceedings in municipal courts under said authority would not constitute "prosecution or punishment" by the university.

The board of regents as the policymaking board for the universities has the duty to establish rules and regulations to govern, regulate, coordinate and oversee the universities and "shall delegate sufficient authority both to its staff and to the heads of the institutions and agencies so that they shall be fully responsible for the management of the several institutions. . ." (§240.001, F. S.)

This authority necessarily includes the duty and responsibility to enforce reasonable rules and regulations of the board and the respective institutions relating to acceptable health and safety conduct of students.

Students have no constitutional right to attend a state university regardless of their conduct. If they violate established rules and regulations governing conduct and moral standards they may be lawfully denied admission to the universities, expelled, placed on probation or otherwise required to comply with reasonable standards of conduct established in the public interest.

As justice Holmes stated in McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N.E. 517, "The petitioner (a policeman) may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Said proceedings are administrative in nature and in no way constitute trial, conviction or punishment by a court within the meaning of the constitutional prohibition against double jeopardy.

Your question is answered in the negative.

066-31—March 24, 1966

SCHOLARSHIPS—INSTITUTIONS OF HIGHER LEARNING

USE OF RACE TRACK FUNDS UNDER §550.08, F. S., IN MATCHING FEDERAL FUNDS

To: W. G. Hendricks, Business Manager, Board of Regents, Tallahassee

QUESTION:

In your opinion 061-66, you advise that the board of regents is authorized to utilize the funds provided under §550.08, F. S., for student loans as well as scholarships. Does the board of regents have the right to use some of these moneys for matching with federal funds in order to secure maximum moneys for student loan purposes?

I concur in the opinion of my predecessor released in 1961 (AGO 061-66).

I am advised that federal funds for scholarship loans are released to the universities for the purpose of establishing revolving loan funds and that they are administered by the universities. Under these circumstances, it is my opinion that the funds provided by §550.08, F. S. (race track scholarships) could properly be used to match federal funds released for scholarship loans.

Your question is answered in the affirmative.

066-32—March 30, 1966

LICENSE TAXES

TRAVELING SHOW PERMIT—EXEMPTIONS, STUDENT ACTIVITIES AT INSTITUTIONS OF HIGHER LEARNING

To: W. G. Hendricks, Business Manager, Board of Regents, Tallahassee

QUESTION:

Does §205.322, F. S., require a "traveling show permit" to be obtained for student entertainment such as sports events, musical concerts, dance bands and dramatic productions when such activities are produced or conducted by state institutions of higher learning or authorized student organizations when off-campus professional talent is employed for such entertainment?

Section 205.322, F. S., provides, in part:

(1) It is unlawful for any person to engage in the business of traveling shows, exhibitions or amusement enterprises including (without in any manner limiting the general terms) circuses, carnivals, rodeos, riding devices, traveling animal shows, ice shows, vaudeville, minstrels, theatrical games or tests of skills, dramatic repertoires or other shows and amusements, operating within or without any tent, structure or enclosure permanent or temporary in nature, which shall operate in a city, town or county of the state for a period of less than thirty days, without having first obtained from the state revenue commission a permit so to do for each location where appearing.

(2) Exempted from the provisions of this act are:

(a) Public fairs and expositions under chapter 616.

(b) Games, contests, recitals, plays by or between schools, universities, colleges, including bona fide church benefits and also games by organized baseball or football teams.

In my opinion §205.322, F. S., does not apply to state universities and their student activities since they are specifically exempted. Your question is therefore answered in the negative.

066-33—March 30, 1966

COUNTY SCHOOL SYSTEM

PURCHASING—POWERS AND DUTIES OF BOARDS OF PUBLIC INSTRUCTION, COUNTY SUPERINTENDENTS

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May a county board of public instruction authorize a person not recommended by and not functioning under the direction of the county superintendent to make purchases?

2. Under the provisions of §237.02(1), F. S., must a person, other than the county superintendent, authorized by the county board to make purchases be recommended by the superintendent and be under his direction and supervision?

Section 230.23(5)(a) and (b), F. S., relating to powers and duties of county school boards, provides:

(a) *Positions and qualifications.*—Act upon recommendations submitted by the county superintendent for positions to be filled and for minimum qualifications for personnel for the various positions.

(b) *Appointment; other than instructional staff and other employees in district schools.*—Act on written recommendations submitted by the county superintendent of persons to act as administrative, supervisory, technical, attendance or health assistants, his office assistants, and bus drivers and appoint persons to fill such positions.

Section 230.33(7)(a) and (i), F. S., relating to the duties and responsibilities of county school superintendents, provides:

(a) *Positions and qualifications.*—Recommend to the county board duties and responsibilities which need to be performed and positions which need to be filled to make possible the development of an adequate school program in the county and recommend minimum qualifications of personnel for these various positions.

* * * * *

(i) *Direct work of employees and supervise instruction.*—Direct or arrange for the proper direction and improvement, under regulations of the county board, of the work of all members of the instructional staff and other employees of the county school system; supervise or arrange under regulations of the county board for the supervision of instruction in the county and take such steps as are necessary to bring about continuous improvement.

Section 237.02(1), F. S., relating to purchases by county school boards, provides:

> (1) PURCHASES.—The plan for making purchases in any county shall be approved by the county board. *Purchases of any item costing more than three hundred dollars must first be specifically authorized by the county board. The county superintendent may be authorized to make purchases or to approve purchases of a business assistant functioning under his direction of small items where the total amount of the purchase does not exceed an amount prescribed by the county board. No person, unless authorized to do so under regulations of the county board, may make any purchase involving the use of school funds; no expenditures for any such unauthorized purchase shall be approved by the county board. Before making any purchase which he is authorized by the county board to make or before recommending any purchase to the board, the county superintendent shall, insofar as possible, propose standards and specifications which are to be prescribed for materials to be purchased.* He shall see that all materials thus purchased conform to those standards and specifications, and shall take such other steps as are necessary to see that the maximum value is being received for any money expended. (Emphasis supplied.)

Section 237.09, F. S., relates to the duties of county superintendents in preparing budgets.

Section 237.23, F. S., provides for a penalty for violation of purchasing laws applicable to school systems.

Section 237.31(3), F. S., provides, in part:

> (3) SCHOOL EMPLOYEES.—It shall be the responsibility of the county board to provide for the bonding of any school employee who is responsible for school moneys or property. . .

Taking into consideration the above-cited statutory provisions, it is my opinion that county school superintendents have the duty to recommend personnel to serve as purchasing agents for the board. Such recommendations are subject to final approval of the county school board.

In case the second recommendation or nomination by the superintendent is rejected by the county school board, the board shall then proceed on its own motion to fill the position (§230.23(5)(d), F. S.).

Purchasing agents when employed serve under the direction of the superintendent.

Question 1 is answered in the negative subject to the provisions of §230.23(5)(d), F. S., *supra*.

Question 2 is answered in the affirmative subject to the provisions of §230.23(5)(d), F. S., *supra*.

066-34—March 31, 1966

OSTEOPATHIC PHYSICIANS

PRACTICE IN PUBLIC HOSPITALS—NO PROHIBITION

To: Dr. O. J. Lawrance, Secretary-Treasurer, Board of Osteopathic Examiners, St. Petersburg

QUESTION:

What is the present status of the laws of this state as they pertain to osteopathic physicians practicing in public hospitals?

On Jan. 25, 1961, this office received an inquiry concerning the then existence of any state laws either prohibiting osteopathic physicians from practicing in hospitals in this state or prohibiting discrimination against doctors of osteopathy (AGO 061-10, 1961-62 biennial report pp. 17 and 18).

The opinion stated that "there is no law in the state which prohibits Osteopaths from *practicing* in hospitals." (Emphasis supplied.) The opinion was based on the interpretation of §459.13, F. S., granting osteopathic physicians the "same rights as physicians and surgeons of other schools of medicine with respect to the treatment of cases . . . in public institutions." However, it was further pointed out that the Sup. Ct. of Fla., has ruled that "such statute in itself does not prohibit public institutions from *discriminating* against osteopaths," (see Richardson v. City of Miami, 198 So. 51). The opinion also noted that an exception to the Richardson case "would exist in those cases where a public hospital has provisions in its enabling statute *prohibiting* discrimination." (Emphasis supplied.)

It is to be noted that the decision in the Richardson case, which was rendered in 1940, was concerned with an interpretation of §459.13, F. S., as it related to osteopathic physicians practicing in municipal hospitals. In 1961, and subsequent to the writing of opinion 061-10, *supra*, the legislature amended §155.18, F. S., relating to discrimination of doctors in county hospitals organized under the provisions of Ch. 155, F. S. Section 155.18, F. S., as amended, provides as follows:

> *County hospitals; discrimination against doctors; etc.*—The board of trustees of any hospital organized under this chapter is authorized to promulgate rules and regulations governing the granting and revoking of privileges to treat patients in the hospital. Such rules shall provide that only those persons licensed to practice medicine and surgery, i.e., medical doctors and *osteopathic physicians*, may be granted privileges to treat patients in the hospital. Such doctors and physicians may retain their privileges so long as they comply with the rules and regulations of the board of trustees. (Emphasis supplied.)

A declaratory decree rendered by the circuit court in Mabrey v. Schuler *et al.*, by judge Hugh Taylor on Apr. 27, 1962, in and for Franklin county, the court discussed two possible interpretations to be given to §155.18, F. S., as amended, as follows: "(1) That it was the purpose of the legislature to remove the formerly-existing prohibitions against permitting osteopaths to practice in hospitals operated under Chapter 155, Florida Statutes, but leaving a discretion vested in the trustees to permit or decline to permit osteopaths to so practice, or (2) that it was the legislative intent to change the restric-

tion against osteopaths practicing in such hospitals into a positive requirement that they be permitted to do so."

Unfortunately, the court did not determine which of the aforementioned interpretations was correct as it appears that the hospital in question had since the amending of §155.18, F. S., adopted bylaws permitting osteopaths to practice in said hospital. In this regard the court observed as follows:

> It is apparent that, even if the statute is permissive only as to the presence of osteopaths on the staff, the by-laws have fixed the policy of this hospital in this respect.

Subsequent to the entry of the declaratory decree the hospital in question again amended its bylaws to limit the membership of the medical staff to doctors of medicine only. In a final decree rendered by judge Taylor on Apr. 23, 1963, the court made the following observations in regard to §155.18, F. S.:

> It is the finding of this Court, that the legislature of the state of Florida, by enacting the amendment to Section 155.18, Florida Statutes, Chapter 61-378, Laws of Florida 1961, recognized the qualifications of doctors of osteopathic medicine to practice the healing arts in hospitals that were created under Chapter 155, Florida Statutes. (Mabrey v. Marks, *et al.*)

The Cir. Ct. concluded that the hospital in question could not amend its bylaws for the specific purpose of removing the named plaintiff from the medical staff of the hospital and "that attempting to do so amounts to an effort to circumvent the decision of this court." The foregoing decisions were apparently never appealed nor are we aware of any appellate court construction of §155.18, F. S.

It is difficult to speculate what effect the amendment of §155.18, F. S., will have upon the decision in the Richardson case, *supra.* Said §155.18, F. S., is applicable only to county hospitals established under the provisions of Ch. 155, F. S., whereas the Richardson case dealt with osteopathic practice in municipal hospitals. The whole question of the exclusion of or discrimination against certain practitioners by hospital authorities is surrounded by a difference of judicial opinion. A recent annotation of this question in 24 A.L.R. 2d 850-864, points out these differences. In Monroe v. Wall, 340 P. 2d 369, the Sup. Ct. of New Mexico in 1959 held that the statutes respecting osteopathic physicians do not require a governing board of a public hospital to afford the osteopathic physicians and surgeons the same treatment as given to doctors of medicine. The pertinent osteopathic statutes in force in New Mexico at that time differed in certain respects from the provisions of the Florida osteopathic statutes involved in the Richardson case, *supra.* The New Mexico court, however, cited the Richardson case in support of its conclusion. It is to be noted that provisions similar to those presently found in §155.18, F. S., were apparently not in force and effect at the time of the New Mexico decision.

In a more recent decision rendered by the Sup. Ct. of New Jersey in 1963 it was held that a private hospital, which was a nonprofit corporation soliciting and receiving charitable contributions, receiving municipal and county funds, receiving tax exemptions and eligible for federal funds under the Hill-Burton act, could not exclude osteopathic physicians from membership on the medical staff of the hospital for the reason that the osteopath was not a graduate of a medical school approved by the American medical ass'n. and the county medical society. Greisman v. Newcomb Hospital, 192 A. 2d 817. The

New Jersey Sup. Ct's. decision was not premised on provisions found in the osteopathic law or those similar to §155.18, F. S., but rather on considerations of public policy. The Sup. Ct. concluded as follows:

> Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public. They must recognize that their powers, particularly those relating to the selection of staff members, are powers in trust which are always to be dealt with as such. While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked at the threshold to preclude an application for staff membership, *not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in furtherance of the common good.* (Emphasis supplied.)

In light of the foregoing opinions, decisions and statutes, your question is answered as follows:

1. Presently there are no state statutes prohibiting osteopathic physicians from practicing in public hospitals.

2. We are not aware of state statutes specifically prohibiting discrimination against doctors of osteopathy in treating their patients in public hospitals unless such provision is contained in the enabling act creating such hospital or in the hospital bylaws. However, in view of the amendment to §155.18, F. S., and the recent decisions in other jurisdictions recognizing qualifications of doctors of osteopathy, it is seriously doubted that county hospitals organized under provisions of Ch. 155, F. S., can specifically discriminate against osteopathic physicians. Except for the decision in the Richardson case in 1940 concerning municipal hospitals, we are not aware of any Florida case involving public hospitals generally. However, in the recent decision of Greisman v. Newcomb Hospital, *supra*, the Sup. Ct. of New Jersey, absent any statute requiring equal treatment, struck down the arbitrary exclusion of an osteopathic physician, recognizing the right of osteopaths to practice in public hospitals as being one based upon public interest and consideration of fairness and justness.

066-35—April 8, 1966

ELECTORS AND ELECTIONS

CANDIDATES FOR PUBLIC OFFICE—PROMOTION—CONSTRUCTION OF §§99.172 AND 104.061, F. S., AS AMENDED IN 1965

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

> **May candidates for public office now use matchbooks, blotters, pencils, balloons, combs and other items of nominal value in promoting their candidacy in light of the amendments to §§99.172 and 104.061, F. S.?**

Heretofore, §99.172(3), F. S., 1963, provided in part:

> The expenditure of any money or giving, paying or prom-

ising to give or pay any money or anything of value directly or indirectly by any candidate *in furtherance of his candidacy* for nomination or election, . . . is prohibited. (Emphasis supplied.)

Section 104.061, F. S., 1963, previously provided in part:

> No person *in the furtherance of or in opposition to the candidacy* of any person for nomination or election in any election shall give or promise to give, pay, loan, expend or contribute any money or other thing of value for any proposition whatsoever; . . . (Emphasis supplied.)

Section 99.172(2), F. S., as amended by Ch. 65-375, now provides:

> The buying of votes is prohibited and anyone who directly or indirectly, knowingly and intentionally pays, gives or promises to pay or give any money or thing of value to any elector *in exchange for his vote*, shall upon conviction, be guilty of a felony; provided however, this shall not apply to the serving of food to be consumed at a political rally or meeting. (Emphasis supplied.)

Section 104.061(2), F. S., now provides:

> No person shall directly or indirectly give or promise anything of value to another *intending thereby to buy his or another's vote*, or to corruptly influence him or another in casting his vote. . . . (Emphasis supplied.)

As you can see from the above-quoted statutes the language contained therein was substantially revised in 1965. Under the law applicable in 1963 and prior thereto a candidate was prohibited from giving anything of value "in furtherance of his candidacy" and the law was so interpreted in AGO's 050-83, 051-421 and 051-471.

Under the new law the prohibition is limited to "the buying of votes" and the giving of a "thing of value to any elector *in exchange for his vote*." (Emphasis supplied.) The apparent distinction is that prior to the 1965 session of the legislature it was unlawful for a candidate to give anything of value in connection with his campaign, whereas, under the new law the prohibition is limited to the giving of a thing of value to an elector "in exchange for his vote."

It would appear then that it was the intent of the legislature to liberalize the law to the extent that it would permit a candidate to give away nominal items in furtherance of his candidacy so long as the give aways were not in exchange for a vote. It is doubtful that an elector's vote could be bought with any of the items mentioned in your question or other nominal cost items frequently used by candidates in political campaigns. The primary purpose of using such items is to give the elector some slightly tangible object on which the candidate's name can be imprinted with the thought in mind that the elector will not discard it as quickly as he would an ordinary campaign button or piece of campaign literature.

Accordingly, I would be inclined toward the position that under the provisions of §§99.172 and 104.061, F. S., as amended, it was the intent of the legislature to allow candidates to give away such items as matchbooks, pencils, blotters, balloons, combs and other nominal cost items in promoting their candidacy so long as such give aways are not in exchange for a vote. In keeping with this conclusion, AGO's 050-83, 051-421 and 051-471, are hereby superseded in light of the subsequent amendments to the statutes.

Your question is answered in the affirmative.

066-36—April 12, 1966

LICENSE TAXES

INCIDENTAL SALES OF ANTIQUES AT JUNIOR MUSEUM ANTIQUE SHOWS; LICENSE REQUIREMENTS

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Where persons not engaged in the business of trading in antiques and similar items, display their antiques and similar items at junior museum antique shows primarily for the benefit of the public, but incidentally sell some of their antiques or like items to persons desiring to purchase the same, are the persons making such sales required to pay a license tax and obtain a license under Ch. 205, F. S.?

The above question currently arises concerning a planned antique and similar items show planned in the near future by the Tallahassee junior museum which is a nonprofit, civic orientated organization, incorporated under the nonprofit corporate statutes of Florida, the primary purpose of which is to provide a museum for the children and youth of Leon county and the surrounding territory.

Museums are institutions which preserve and exhibit objects of permanent interest in one or more of the historical arts and sciences; a place where members of current civilization may study and examine objects of past civilizations, and thereby provide educational facilities to be used in a study of past civilizations. Such institutions are educational, scientific, and literary within the purview of §1, Art. IX, and §16, Art. XVI, State Const., so as to be entitled to exemption from ad valorem taxes when used exclusively for such purposes and not for profit. When a museum is operated primarily for profit it becomes a "business, profession or occupation" within the purview and intention of §205.01, F. S., et seq., so that a license tax must be obtained therefor. The Tallahassee junior museum, as presently operated, is not a business, profession or occupation within the purview of said §205.01, F. S., and no license is required for the operation thereof.

The Tallahassee junior museum from time to time, in order to advertise itself and so that the public will become acquainted with it, promotes antique and like shows at which persons, firms and corporations are permitted to display, in the facilities of the museum, antiques and items of historical interest, thereby increasing the items of historical interest the public may see, inspect and study. Persons, firms and corporations, exhibiting antiques and things of historical interest, but who are not engaged in the business of dealing in and selling antiques and things of historical interest, often have antique items or things of historical interest which they are willing to dispose of to any person who may be interested in acquiring the same.

Section 205.01, F. S., provides that "no person shall engage in or manage any *business, profession or occupation* for which an occupational license tax is required by this chapter or other law of this state," unless a license tax is paid therefor and a license is obtained from the proper officer. The requirement is that persons, firms and corporations who "engage in or manage any *business, profession or occupation*" for which a license tax is required, must pay the license tax required and obtain a license. (Emphasis supplied.) In Texas Co. v. Amos, 77 Fla. 327, 81 So. 471, text 472, the Sup. Ct. of Fla. deemed

the phrase "business, profession or occupation" to be more cumulative than distinctive, and held all three terms to be all "comprehended in the word 'business'." In this case the above-quoted phrase was held to refer to a business, profession or occupation in which a person is engaged in to procure a living, one carried on with a view of profit or livelihood, one carried on in a commercial sense. To the same effect see also 53 C.J.S. 556, §27.

The primary question to be determined by the county tax collector in cases such as that mentioned above, is whether the sale of antiques, made or to be made, is a sale in connection with the operation or carrying on of a business, profession or occupation contemplated by §205.01, F. S. Stated differently, is the display by the owner at the antique show held by the junior museum or other organization primarily for the purpose of showing the antique items, or similar items, to the public for their education and information, or primarily for the purpose of selling antique and similar items owned or held by them? Stated another way, was the primary purpose the information, entertainment and education of the public, or the sale of the antiques or similar items, owned by the person making the display in connection with a business operated by him. If the latter is a business within the purview of §205.01, F. S., subject to license taxes under Ch. 205, F. S., then a license tax liability arises. The question of what is the primary purpose of the person, firm or corporation, in displaying his or its antiques and similar things, and whether there is a tax liability is largely a question of fact to be determined by the tax collector under the guidelines above-mentioned.

066-37—April 13, 1966

GOVERNOR

EXECUTIVE ORDER AUTHORIZING COUNTIES TO PROVIDE AMBULANCE SERVICE

To: Hon. Haydon Burns, Governor, Tallahassee

QUESTION:

Does the governor have authority to issue an executive order to authorize the several counties of the state to provide emergency ambulance service for the general public?

It has been consistently recognized that a board of county commissioners has only such authority as is conferred by statute. Peters v. Meeks, App., 163 So.2d 753 (1964); Bowden v. Ricker, 70 Fla. 154, 69 So. 694 (1915); Stephens v. Futch, 73 Fla. 708, 74 So. 805 (1917); Colen v. Sunhaven Homes, Inc., 98 So.2d 501 (1958); State *ex rel* Landis v. Wheat, 103 Fla. 1, 137 So. 277 (1931); State v. Walton County, 93 Fla. 796, 112 So. 630 (1927).

Under the organic law of this state "the respective counties of the state shall provide in the manner prescribed by law for those of the inhabitants who by reason of age, infirmity or misfortune, may have claims upon the aid and sympathy of society." Section 3, Art. XIII, State Const. Implementing this pronouncement is §125.01(4), F. S., which authorizes the board of county commissioners "To have care and provide for the poor and indigent people of the county."

Pursuant to these authorities, unquestionably a board of county commissioners would be authorized to expend county funds for ambulance service "for the poor and indigent people of the county."

> The Supreme Executive power of the State shall be vested in a Chief Magistrate, who shall be styled the Governor of Florida. (Section 1, Art. IV, State Const.)

and

"The Governor shall be commander in Chief of the military forces of the State, except when they shall be called into the service of the United States." Section 4, Art. IV, State Const. The governor is charged with the responsibility to "take care that the laws be faithfully executed." Section 6, Art. IV, State Const. It is also his duty to "transact all Executive business with the officers of the Government, civil and military, and may require information in writing from the administrative officers of the Executive Department upon any subject relating to the duties of their respective offices." Section 5, Art. IV, State Const.

In certain instances the legislature has recognized a need and expressly provided for the exercise of the authority of the governor to promulgate emergency rules and regulations necessary to prevent, control or quell violence, threatened or actual, during emergencies lawfully declared by him to exist. The purpose of such executive rules and regulations is to protect the public welfare, persons, and property of citizens against violence, public property damage, overt threats of violence and to maintain peace, tranquillity and good order in the state. (§§14.02, 14.021 and 14.022, F. S., 1965)

The above statutory powers supplemental to the supreme executive power authorized by the constitution, relate to matters involving danger, violence or threats of such danger and violence to persons and property in this state.

In considering the exercise of the supreme executive power of this state the Fla. Sup. Ct. has held that:

> The meaning and effect of these provisions (Const. art. 2, art. 3 §1, art. 4 §1, art. 5, §1) are that, except as otherwise expressly provided in the Constitution, all the purely legislative power of the state shall be exercised exclusively by the Senate and House of Representatives, that all the purely executive power of the state shall be exercised exclusively by the Governor, and that all the purely judicial power of the state shall be exercised exclusively by the tribunals specified. State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969, 32 L.R.A., N.S., 639 (1909).

And, in addition the Sup. Ct. has noted that:

> The principle that emergencies do not create power or authority but may afford occasion for the exercise of powers already existing is applicable to executive powers and authority to meet great public emergencies and to conserve governmental efficiency and welfare of the state. In re Advisory Opinion to the Governor, 151 Fla. 44, 9 So.2d 172, 140 A.L.R. 1492 (1942).

You advise that ambulance service heretofore provided by local funeral homes in the several counties will be discontinued in the near future, leaving no one to perform this vital service, and that your inquiry stems from a desire to make available ambulance service as needed by the people of Florida.

Inasmuch as the enactment of enabling legislation authorizing a board of county commissioners to provide emergency ambulance service for persons in the county is a legislative function, and inasmuch as there appears no clear and present danger of violence to the property and citizens of this state which could be considered as requiring the establishment of available ambulance service to be provided by a state law

enforcement agency, it is my opinion that the governor may not by executive order authorize the several counties of this state to provide emergency ambulance service for the general public.

In response to your inquiry, examination of Ch. 252, F. S., pertaining to civil defense, as amended by Ch. 65-504, has been made for a legislative pronouncement which could be considered a proper basis for declaration of the governor that emergency exists because of insufficient ambulance service in this state. Notably the provisions of Ch. 252, F. S., are subject to certain limitations. Section 252.071, F. S., provides that:

> Whenever, due to an emergency resulting from natural phenomena or accident, such as fire, flood, tornado, hurricane, explosion, wreck, accident involving radiation by-products, or other disasters resulting from natural or accidental causes; or whenever, due to the immediate probability or imminence of such disasters:
>
> (1) The governor may declare that a state of emergency exists, and thereafter may, for such period as such emergency exists or continues, exercise such emergency powers and take such actions as determined necessary and appropriate for the protection of life, health and property; the alleviation of suffering and the rapid restoration of public facilities and services.
>
> (2) The governing bodies of counties and municipalities may declare that a state of emergency exists within the boundaries of their political jurisdiction for a period not to exceed forty-eight hours, unless further extended by the governor, and thereafter may for such period as such emergency exists or continues, exercise such emergency powers and take such actions as determined necessary and appropriate for the protection of life, health and property; the alleviation of suffering and the rapid restoration of public facilities and services.

However, in its declaration of policy and purpose of the civil defense law the legislature has provided in §252.02:

> (1) Because of the existing and continuing possibility of the occurrence of disasters or emergencies of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action or from natural causes, and in order to insure that preparations of this state will be adequate to deal with such disasters or emergencies, and generally to provide for the common defense and to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state, it is hereby found and declared to be necessary:
>
> * * * * *
>
> (b) To confer upon the governor, upon the state civil defense council and upon the governing body of each political subdivision of the state the emergency powers provided herein.

Not unmindful of the circumstances occasioned or about to be occasioned by the discontinuance of emergency ambulance service in certain areas of the state, it does not appear that an emergency of the type cognizable under the provisions of Ch. 252, F. S., the civil defense law, can be considered to exist.

066-38—April 14, 1966

FREEHOLDER

FREEHOLD STATUS OF PERSON HOLDING 99-YEAR LEASE

To: Elsie B. Garrett, Supervisor of Elections, Crestview

QUESTION:

Does a person occupying a parcel of property under a 99-year lease have sufficient interest in the real estate to be eligible to qualify as a freeholder?

The definition of a freeholder is found in §97.021(7), F. S., which provides in part:

> A 'freeholder' is any person who has an immediately beneficial ownership interest, legal or equitable, in the title to a fee simple estate in land: . . .

Prior to 1965, freeholders were defined in identical fashion in §100.241(1)(a), F. S. Although there have been no decisions on point under this section, I direct your attention to the provisions of §7, Art. X, State Const., the homestead exemption amendment, which provides in part:

> *Every person who has the legal title or beneficial title in equity to real property* in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption . . . (Emphasis supplied.)

A comparison of §97.021(7), F. S., with §7, Art. X, State Const., reveals that the property ownership requirements described in each are just about identical.

This office has been called upon on several occasions to rule on whether a person holding a 99-year lease is eligible for homestead exemption. The landmark opinion in this regard appears to be AGO 053-335, p. 312 of the 1953-54 biennial report of the attorney general, in which it was said:

> *Except where modified by statute* (and we know of no such statute in this state) *leases for terms of years, however long, are chattels real falling within the classification of personal property* (51 C. J. S. 531, §26; 32 Am. Jur. 39, §16). In this connection see also 51 C. J. S. 763, §37; 61 C. J. 210, §184; 2 Cooley on Taxation, 4th Ed., 1268, §593. Being personal property and not real property, *a long term lease for a given number of years cannot be made the basis for homestead tax exemption* under said §7, Art. X, of the State Constitution. (Emphasis supplied.)

This opinion was cited with approval in the answer to question 2 of AGO 057-281, p. 339 of the 1957-58 biennial report of the attorney general, and again in the answer to question 4 in AGO 060-56, p. 525 of the 1959-60 biennial report of the attorney general, p. 526. In this latter opinion the following observations are made:

> . . . 'At common law estates for years were classified as chattels real and regarded as personal property. Dabney v. Edwards, 5 Cal. 2d 1, 53 P. 2d 962, 103 A.L.R. 822. Of similar import was the holding in Townsend v. Boyd, 217 Pa. 386, 66 A. 1099, 12 L. R. A. (NS) 1148.' (De Vore v. Lee, 158 Fla. 608, 30 So. 2d. 924, text 926). In this connection see also 51 C.J.S.

531, §26; 32 Am. Jur. 39, §16; 2 Cooley on Taxation, 4th Ed. 1268, §593; 3 Thompson on Real Property, 1959 Replacement, 6, §1016; 11 C. J. 385, §2; 31 C.J.S. 27, §12; 73 C.J.S. 172 and 173, §8; Currington v. State, 89 Fla. 494, 86 So. 344, Text 345; Mathews v. McCain, 125 Fla. 840, 170 So. 322, text 325. Notwithstanding that a lease of real property for a term of years is within the statutes of frauds (§689.01, F. S.) and must be in writing, it is, nevertheless, personalty and not realty.

A similar conclusion was also reached in AGO 052-298, p. 360 of the 1951-52 biennial report of the attorney general, and in attorney general Davis' opinion of October 31, 1927, p. 433 of the 1927-28 biennial report of the attorney general, which specifically deals with the eligibility of a freeholder under the election laws.

In light of the similarity between the wording of §97.021(7), F. S., and §7, Art. X, State Const., and the foregoing authorities, I am inclined toward the position that a person occupying a parcel of property under a 99-year lease does not have sufficient interest in the real estate to be eligible to qualify as a freeholder.

Your question as set out above is answered in the negative.

066-39—April 14, 1966

COUNTY BOARD OF PUBLIC INSTRUCTION

SCHOOL BUSES—BOARD'S AUTHORITY TO LEASE OR SELL TO UNOFFICIAL LOCAL SCHOOL ASSOCIATION —LIABILITY INSURANCE AND OTHER RESPONSIBILITIES

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May local unofficial school associations such as parent-teacher associations either through lease, purchase or contract use school buses to transport pupils, who live less than two miles from the school attended, to and from public schools?

2. If the answer to question 1 is in the affirmative, is the unofficial association or the county board of public instruction responsible for providing liability insurance for the protection of such transported pupils?

3. If the answer to question 1 is in the negative, is the operation legal where the county board retains title to the bus and pays the premium for the liability insurance while the association pays all other costs of operation?

4. If such unofficial school association may provide transportation services outside the supervision of the county school board, what legal requirements are imposed by law on such associations regarding the safety and welfare of pupils, such as qualifications of drivers, and the type and maintenance of equipment?

Your attention is directed to AGO 062-158 issued Nov. 28, 1962. I concur in said opinion which dealt with the question of use by a county school board of state minimum foundation funds for transporting school children while contracting with a "quasi-public corporation" to furnish transportation services.

Attorney general's opinion 062-158 stated, in part:

In my opinion a county school board may legally contract for pupil transportation with either an individual, private cor-

poration, or a quasi-public corporation, provided the above quoted statutory provisions are complied with as well as other related sections of the school code dealing with safety and purchasing procedures.

Opinion 062-158, however, did not contemplate the transportation of school children who live within two miles of the school.

Section 234.01, F. S., provides, in part:

> *Purpose.*—County boards, after considering recommendations of the county superintendent and any suggestions which may have been submitted by trustees of the district shall provide transportation for each pupil who should attend a public school when and only when transportation is necessary for accomplishment of one of the following purposes: to provide adequate educational facilities and opportunities which otherwise would not be available; to transport pupils whose homes are more than a reasonable walking distance, as defined by regulations of the state board, from the nearest appropriate school; provided, that no state funds shall be paid for the transportation of pupils whose homes are within two miles from the nearest appropriate school; . . .

Section 234.06, F. S., provides:

> *Definition of transportation equipment.*—'Transportation equipment' is defined as any vehicle or conveyance used for transportation of pupils when the cost of rent, lease, purchase, maintenance, or operation of said vehicle or conveyance is defrayed in whole or in part from public school funds.

There appears to be no statutory prohibition against transporting children who live less than two miles from school provided state funds are not used. In other words, the cost of school bus transportation within a two mile radius would have to be paid from local school funds and also such transportation would be subject to existing state board of education regulations.

In the event a school board contracted as contemplated in your question for school bus transportation of children living within a two mile radius of the school which they attend the board would be obligated to provide the insurance protection required by §234.03, F. S., which provides, in part:

> (1) . . . County boards are required to secure and keep in force, in companies duly authorized to do business in Florida, insurance covering liability for damages on account of bodily injury, or death resulting therefrom, to pupils legally enrolled in the public schools, by reason of the ownership, maintenance, operation, or use of school buses and other vehicles while said pupils are being transported to or from a school or school activity. . . .

The county school board would also be required to observe all other requirements of Ch. 234, F. S., relating to the safety and health of pupils transported to and from school in vehicles as defined in §234.06, F. S.

Question 1 is answered in the affirmative provided state minimum foundation funds are not used and provided insurance is carried by the board in compliance with §234.03, F. S., and further provided all statutory requirements relating to health and safety are complied with by the board and its contracting agency.

Question 2 is answered in accord with the answer to question 1.

Questions 3 and 4 are answered by question 1. Such services may not be provided outside the supervision of the county school board.

066-40—April 14, 1966

MOTOR VEHICLES

DEALERS' LICENSES—WHEN REQUIRED; EXCEPTION

To: Charles Knott, Attorney, Department of Motor Vehicles, Tallahassee

QUESTION:

May a business firm which owns a number of motor vehicles, used in connection with the firm's business, offer for sale and sell to the public more than three of such vehicles in any twelve months period without obtaining a motor vehicle dealers license, where such firm is not engaged primarily in the business of buying, selling and trading in motor vehicles?

As you mention in your letter, the type of business firm with which we are here concerned is not ". . . engaged in the business of buying, selling or dealing in motor vehicles or offering or displaying motor vehicles for sale," as the term "motor vehicle dealer" is defined in §320.27-(1)(d), F. S. On the other hand, many of such firms do offer for sale in a 12 month period more than 3 motor vehicles which have been used in the conduct of their businesses. This fact, considered independently, would appear to place such business within the prima facie presumption also prescribed in §320.27(1)(d), F. S., that: ". . . Any person who buys, sells or deals in three or more motor vehicles in any twelve months period (is) engaged in (the business of motor vehicle dealer)" and thus subject to the license required by §320.27(2), F. S.

However, §320.27(3), F. S., further requires that each applicant for such a license shall certify:

> . . . that the location . . . is a suitable place where the applicant can in good faith carry on such business (and) that the business of a motor vehicle dealer is the *principal business which shall be conducted* at the said location; (and) that the applicant is either: Franchised by a manufacturer of motor vehicles . . . or (that he is) an independent (non-franchised) motor vehicle dealer. (Emphasis supplied.)

From the foregoing, it would appear that few, if any, of the businesses included within the scope of your inquiry, could so certify in good faith. The particular point of your inquiry has apparently not been the subject of judicial determination, but I am of the opinion it was not the intention of the legislature that a business firm unable to certify that the "principal business which shall be conducted" by it at any given location is that of a "motor vehicle dealer" should be required to meet the license requirements of §320.27, F. S.

Your question, as phrased, must therefore be answered in the affirmative.

066-41—April 14, 1966

CRIMES

GAMBLING LAWS—BINGO, GUEST—GOLF OR BOWLING TOURNAMENTS

To: Alan R. Williams, County Prosecutor, Clearwater

QUESTIONS:

1. Where a contestant pays a monetary consideration for the privilege of entering a golf tournament or a bowling tourna-

ment, and has an opportunity to win a valuable prize by the exercise of skill, does this constitute a violation of any of the gambling laws of Florida?

2. How is bingo or "Guest" to be distinguished from a golf tournament or a bowling tournament insofar as gambling is concerned?

AS TO QUESTION 1:

Golf and bowling tournaments are predominantly contests of skill and our only gambling statute which applies to contests of skill is §849.14, F. S., which reads as follows:

> 849.14 *Unlawful to bet on result of trial or contest of skill, etc.—Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill,* speed or power or endurance of man or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of gambling, and shall be punished by imprisonment not exceeding six months or by fine not exceeding five hundred dollars. (Emphasis supplied.)

This statute applies to a "stake," "bet" or "wager." Therefore, the answer to question 1 depends upon whether or not the payment of an entrance fee by each competitor in a golf tournament or bowling tournament amounts to a stake, bet or wager, where valuable prizes are awarded to the winners. (In gambling lingo, "stake," "bet" and "wager" are synonymous terms. Creash v. State, 179 So. 149.)

In 38 C.J.S. 81, Gaming, §5, states:

> It is held that the contest does not become a wager by the mere fact that the contestants are required to pay an entrance fee, where the entrance fee does not specifically make up the purse or premium contested for, or by the fact that the purse offered consists in part of entrance fees and in part of an added sum.

In 24 Am. Jur. 442, Gaming, §63, states:

> . . . The deposit of an entrance fee to enable the depositor to compete for a prize in an athletic contest is not a bet. . . .

In 24 Am. Jur. 473-474, Gaming, §100, states:

> . . . Moreover, the offering of and paying of premiums or prizes by a racing association to the owner of horses contesting at racing held by such association are not gambling, even where entrance fees are paid to such association, if such fees are put into its general fund, and become, for the time being, a part of its assets, subject only to the obligation of the association to pay out of its funds definite sums which it has offered as premiums or prizes, regardless of the amount of entrance fees received. Horse racing under such circumstances differs from that in which a stake is contributed by the participants alone. . . .

(Since §849.14, F. S., applies to wagers on contests of either speed or skill, the statements in the preceding quotation with reference to horse races, which involve speed, are equally applicable to golf or bowling tournaments, which involve skill.)

In 24 Am. Jur. 441-442, Gaming, §63, states:

> . . . A purse, prize, or premium is, on the other hand, ordinarily something of value offered by a person to the successful competitor in a contest in which the person offering the purse, prize, or premium does not engage. He has no chance of gaining the thing offered, and, if he abides by his offer, must give it over to some one of those contending for it. . . .

In the light of the foregoing authorities, I conclude that there is no stake, bet or wager, and therefore no violation of our gambling laws, where the contestants in a golf or bowling tournament pay entry fees and have the opportunity to win valuable prizes by the exercise of skill, provided that the entry fees do not specifically make up the purses, prizes or premiums contested for.

Of course, the posting of entry fees could be merely a device resorted to in an effort to disguise a gambling transaction, as, for example, if such fees were put in a "pot" for which the golfers or bowlers played. In such case, the fees would specifically make up the prizes and the transaction would violate §849.14, F. S. In this connection, I quote the following observations made by the Sup. Ct. of Montana in Toomey v. Penwell, 245 P. 943, a case in which the decision was in line with the foregoing quotations from Corpus Juris Secundum and American Jurisprudence, to wit:

> But these observations and the authorities cited have to do with bona fide transactions, and not with gambling so cleverly disguised as to appear to be what it is not. They are predicated upon the theory that the so-called entrance fee is an amount of money actually paid unconditionally and in good faith for the privilege of entering the contest, and for no other purpose. If in fact the fee is not paid for such purpose, but is merely posted upon the outcome of the contest, no amount of dissembling can save the transaction from the condemnation of our anti-gambling statute.

AS TO QUESTION 2:

Bingo may be distinguished from a golf or bowling tournament of the kind approved in my answer to question 1 by the fact that bingo involves betting or wagering while there is no betting or wagering in such a golf or bowling tournament; rather, there is an award of a purse, prize or premium. The same distinction exists between "Guest" (as described in my opinion 066-14, rendered to Sheriff Don Genung on March 2, 1966) and a golf or bowling tournament of the kind hereinabove approved.

066-42—April 15, 1966

LICENSE TAXES

CONSTRUCTION OF §205.53, F. S.—PUBLIC SERVICE ESTABLISHMENTS, ADDITIONAL EMPLOYEES

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

> **Are public service establishments liable, under §205.53, F. S., for additional license charges when they add additional employees after being licensed, and, if so, when do such additional charges accrue and become payable?**

It appears from your file handed us with your request for opinion that the above question has been raised in Collier county by the Provincetown-Boston Airlines, Inc., a foreign corporation, licensed to trans-

act business in this state, which operates a commercial air line into and from the said county. The question may be applicable to the Hertz corporation, also a foreign corporation, licensed to transact business in this state. The Hertz corporation operates a rental car service in this state, including Collier county, one such operation being carried on at the Naples airport where persons coming into the airport may lease automobiles from the said Hertz corporation. Although not clear from the file before us, it is possible that the airline company or its employees may, at least on instances, act as agent for Hertz corporation in renting or leasing its automobiles. We find nothing in the file before us to support any contention that the airline operation and the automobile rental service are but a single operation. We must conclude on the information before us that they are separate public service operations.

The above question requires a construction of §205.53, F. S., and especially the provision therein that public services operations: "shall for each place of business pay a license tax of three dollars, *plus an additional amount equal to two dollars for* each person in excess of one employed or working thereat." with the limitation that the license fee thereunder shall not exceed $50. (Emphasis supplied.) Section 205.03, F. S., provides that: "all licenses shall expire on the first day of October of each year, except as otherwise provided by law." Under this provision in the statutes the license tax year begins on Oct. 1 of each year and ends on Sept. 30 of the following year. Said §205.03, F. S., also provides that any person not liable for a license during the first half of the license year may be issued a license during the second half of the license year upon payment of one half of the amount fixed as the price of such license for one year. The statutes make no provision for a partial year license except as above-mentioned. Persons entering a business, profession or occupation, subject to a license tax under Ch. 205, F. S., after March 31 of any license year may obtain a half year license unless it be otherwise expressly provided by an applicable statute.

Our problem here is whether additional license fees are incurred under §205.53, F. S., when additional employees are employed or begin working with a duly licensed business on a date subsequent to the licensing of such business; for example, additional employees employed by either Provincetown-Boston Airlines, Inc., or the Hertz Corporation, after Oct. 1 of a license year for services in Collier county. What additional tax, if any, would be due by a business which after having obtained a license based upon 2 employees, employs 5 additional employees in January of the following year. The provision in said §205.53, F. S., relating to the number of employees in excess of one was brought into the statute law of the state by §6, Ch. 20956, 1941. Under §6, Ch. 18011, 1937, (§205.53, F. S.) there was an additional license tax of $1 per employee in excess of 5 employees. These additional license charges for additional employees impose additional taxes for such additional employees, which accrue upon the employment of such additional employees and are in addition to the taxes already paid under said §205.53, F. S.

Although ad valorem taxes are assessed on taxable properties as of Jan. 1 of the tax year (§§192.04 and 193.11, F. S.) which day determines the taxable or nontaxable status of real and personal property; this rule is not applicable to license taxes there being no comparable tax day. A business opened and put into operation any time during the year is liable to a license tax. Section 205.01, F. S., provides that "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required . . . unless (a license) shall have been procured from the tax collector . . ." The license tax

becomes due and payable when the business, occupation or profession is established or is engaged in, and expires the following Oct. 1.

The above-stated question is answered in the affirmative and the additional license charges accrue and are payable at the time such additional employees become employed and commence to exercise their duties.

066-43—April 15, 1966

EDUCATION

NONPUBLIC SCHOOLS—RULES AND REGULATIONS—STATE BOARD OF EDUCATION, STATE SUPERINTENDENT

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

May the state superintendent of public instruction accredit nonpublic schools which voluntarily seek such accreditation provided the standards prescribed by the state board of education are met?

Section 229.521(20), F. S., relating to duties of the state superintendent of public instruction, provides:

> MINIMUM STANDARDS AND RULES AND REGULATIONS.—To prepare, organize, and recommend to the state board such minimum standards and rules and regulations in the following fields as are required by law or as he may find necessary to aid in carrying out the purposes and objectives of the school code; *and to execute such standards and rules and regulations as are adopted by the state board in the following fields: (1) establishment, organization, and operation of schools, agencies, services, and institutions, including the classification or accreditation of parochial, denominational, and private schools; (2) personnel; (3) child welfare; (4) courses of study and instructional aids; (5) transportation; (6) school plant; (7) finance; (8) records and reports.* (Emphasis supplied.)

Section 229.061(19), F. S., relating to duties of the state board of education, provides, in part:

> PRESCRIBE MINIMUM STANDARDS AND RULES AND REGULATIONS.—To prescribe such minimum standards and rules and regulations as are required by law or as are recommended by the state superintendent in accordance with the provisions of §229.521(20), . . .

Your question is answered in the affirmative. Attorney general's opinion 066-12 is modified to the extent it may be in conflict herewith.

066-44—April 18, 1966

JUVENILES

FINGERPRINTING FOR EMPLOYMENT PURPOSES—INVESTIGATION OF AND SUBJECTION TO POLYGRAPH TEST

To: Hon. Ben J. Sheppard, Judge, Juvenile and Domestic Relations Court, Miami

QUESTIONS:

1. May a prospective employer fingerprint a juvenile not in the custody of the court or any law enforcement agency as

a prerequisite to the employment of said juvenile?

2. May police officers of a juvenile bureau retain a child for the purpose of investigation and the giving of a polygraph test without prior consent for such investigation and test from the juvenile court?

With reference to question 1, since the child in question is not in the custody of a law enforcement agency or the juvenile court, and therefore the juvenile court is not exercising any jurisdiction over the said child, it is my opinion that this type of voluntary fingerprinting would not be in violation of the provisions of Ch. 39, F. S. The child in question is under the care and supervision of his parent or guardian and therefore it would seem that the employer in question should advise that person or persons of his intention to fingerprint this child.

I have attached hereto a copy of a recent opinion issued by this office (AGO 066-2) which I am sure will be of further assistance to you in this matter.

Since the provisions of §39.03(6), F. S., refer only to a child taken into "custody" there seems to be some question as to what use the employer may make of the fingerprints which are taken. However, based on the purpose of Ch. 39 as set out in §39.20, F. S., it is my opinion that these fingerprints should be used only for employment purposes and should not be referred to any agency other than the juvenile courts. Furthermore, Ch. 450, F. S., places certain limitations on the use of child labor. Any employer who desires to hire a minor should be familiar with the provisions of the child labor law (Ch. 450, F. S.).

With reference to question 2, it is my understanding from the limited facts which have been submitted to me that a practice is being engaged in by police officers attached to the juvenile bureau of the local police departments whereby a child is retained for the purpose of investigation, and pursuant to said investigation a polygraph test is administered to the said child. The child is not brought to the juvenile court prior to the commencement of this investigation.

Section 39.03(3), F. S., reads as follows:

> The person *taking* and *retaining* a *child in custody* shall notify the parents or legal custodians of the child and the principal of the school in which said child is enrolled at the earliest practicable time, and shall, without delay *for the purpose of investigation, or any other purpose*, deliver the child, by the most direct practicable route, to the court of the county or district where the child is taken into custody, or, if the judge has so ordered, to a detention home or licensed child caring institution or county or city jail, within the county or district, designated by the judge, and shall at the earliest practicable time report in writing to the court the facts by reason of which the child was taken into custody. . . . (Emphasis supplied.)

The question now arises as to whether or not the retaining for the purpose of investigation and pursuant thereto the giving of a polygraph test would amount to having the said child in custody. It would seem that in order to conduct an investigation and give a polygraph test that the child in question would necessarily be detained for a period of time which, under some circumstances, could amount to custody. It is my feeling that in a case involving a child the word "custody" as used in §39.03, F. S., has a very broad meaning and it is quite possible that the detaining of a child for the purpose of extensive investigation and the giving of a polygraph test would cause the child to be in custody and therefore within the jurisdiction of the juvenile court. "Custody" is the

detaining of a person by virtue of lawful authority and has been held to be nothing less than actual imprisonment (State *ex rel.* Bricker v. Griffith, Ohio, 36 N.E. 2d 489).

If the police investigation requires that a polygraph test be given, it would seem that the investigation had begun to focus on a particular suspect and there is a distinct possibility that incriminating statements may be elicited during such investigation. It would also seem that in order to give such a polygraph test and conduct the type of investigation in question that the child would of necessity be in "custody" as the word is used in §39.03, F. S. Therefore, no such investigation could commence due to the language of §39.03, F. S., which requires a person taking a child into custody to immediately deliver the child to the juvenile court.

On the basis of the foregoing, it is my opinion that if a child is retained by law enforcement officials for the purpose of interrogation and the giving of a polygraph test, the child is in "custody" and therefore within the jurisdiction of the juvenile court. As to whether or not the juvenile court could require a child to submit to a polygraph examination, this is not a matter which will be discussed here. However, I am sure you are aware of the constitutional prohibitions concerning compulsory self-incrimination.

066-45—April 18, 1966

TRANSPORTATION OF SCHOOL CHILDREN

EMERGENCY VEHICLE REQUIRED TO STOP FOR SCHOOL BUS LOADING OR UNLOADING

To: R. B. Spinney, Volunteer Fire Department, Jensen Beach

QUESTION:

> **Are vehicles of a fire department, responding to an emergency fire call, required to stop for a school bus that is loading or unloading school children?**

Whether or not vehicles used by the Jensen Beach volunteer fire department are authorized emergency vehicles depends upon fulfillment of one or more of the requirements as set forth in §317.011(1), F. S., which reads as follows:

> (1) AUTHORIZED EMERGENCY VEHICLE.—Vehicles of the fire department (fire patrol), police vehicles, and such ambulances and emergency vehicles of municipal departments or public service corporations and ambulances operated by private corporations as are designated or authorized by the department of public safety or the chief of police of an incorporated city or any duly elected sheriff of the various counties.

Inasmuch as Jensen Beach is not an incorporated municipality, it would appear that the pertinent provisions are whether or not the Jensen Beach volunteer fire department is a public service corporation that has been designated and authorized as an emergency vehicle by either the department of public safety or the elected sheriff of your county. If it does not meet this test, then naturally it would not be an authorized emergency vehicle under the provisions of §317.011(1), F. S.

Section 317.903, F. S., requires that the operators of all vehicles shall yield the right-of-way upon the approach of an emergency vehicle, that is giving audible signals while enroute to an emergency, by immediately proceeding to a position as close as reasonable to the right

side of the roadway. After pulling to the right side of the roadway the vehicle shall stop and remain stopped until the emergency vehicle has passed, unless directed otherwise by a law enforcement officer. Under the provisions of this section it is the duty of a school bus driver when traveling upon the roadways and streets of this state, or stopped in a line of traffic, to comply with the provisions of this section, and immediately attempt to clear the roadway for approaching emergency vehicles. This is primarily so inasmuch as the school bus driver, with all doors closed, has a captive group completely under his care and control.

Section 317.041(5), F. S., provides in part:

> (b) The driver of an authorized emergency vehicle, except when otherwise directed by a police officer, may:
>
> 1. Park or stand, irrespective of the provisions of this chapter;
>
> 2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
>
> 3. Exceed the maximum speed limits so long as he does not endanger life or property;
>
> 4. Disregard regulations governing direction of movement or turning in specified directions, so long as he does not endanger life or property.

It is interesting to note that the above provisions granting emergency vehicles various privileges pertaining to (1) parking, (2) stop signals, (3) speed limits and (4) directional movement, are coupled with the restriction that they be done in a safe manner so as not to endanger life or property. This duty to exercise due care in the operation of emergency vehicles extends to those situations wherein the emergency vehicle is responding to an emergency call. City of Miami v. Thigpen, 11 So.2d 300. The privilege to pass a loading or unloading school bus is conspicuously absent from the enumerated provisions of §317.041(5)(b), F. S.

Section 234.04, F. S., requiring traffic to stop for school buses reads as follows:

> (1) Any person using, operating or driving a motor vehicle on or over the roads or highways of this state shall, upon approaching any school bus used in transporting school pupils to or from school which is properly identified in substantial accordance with the provisions of §234.08, and which displays a stop signal, bring such motor vehicle to a full stop while such bus is stopped and such motor vehicle shall not pass the school bus until the signal has been withdrawn.

There can be no doubt but that the legislature, in its wisdom, enacted §234.04, F. S., requiring all vehicles to stop for school buses loading and unloading children, primarily because of the hazardous condition created by immature minds. Generally speaking, it may be said that a stopped school bus loading or unloading school children creates an emergency. It would be foolish folly to blandly throw care and caution to the wind and blindly proceed full speed ahead, by a stopped school bus and through school children, on the mere justification that one was on an emergency call. One emergency does not justify the creation of another.

The legislature has seen fit to specifically provide that emergency vehicles are not relieved from the duty of driving with due regard and care for the safety of all persons. When an emergency vehicle is driven with reckless disregard for the safety of others, the driver is answerable for the consequences produced. These provisions are contained in §317.041(5)(c), F. S., and read as follows:

(c) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Your question is, therefore, based upon the aforesaid statutes, answered in the affirmative.

066-46—April 19, 1966

COUNTY SCHOOL SYSTEM

BOARD OF PUBLIC INSTRUCTION—AUTHORIZATION AND REQUIREMENT TO CONSIDER GRIEVANCES AND RECOMMENDATIONS OF INDIVIDUALS AND GROUPS OF OFFICERS OR EMPLOYEES

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May an officer or employee of a county board of public instruction associate, self-organize, and join together and present proposals to said board relative to salaries and other conditions of employment?

2. If question 1 is answered in the affirmative, may an employee as aforesaid present said proposals individually without associating and joining together with others as an association or organization?

3. Where a county board of public instruction is desirous of arriving at a determination of policies affecting certificated personnel, is said board required by law to appoint or recognize existing committees composed of members of the teaching profession?

4. Where a county board of public instruction is desirous of arriving at a determination of policies affecting certificated personnel, and said board recognizes existing committees composed of members of the teaching profession organized to present proposals relative to salaries and other conditions of employment, may the various committees present their proposals respectively?

5. If a county board of public instruction appoints or recognizes existing committees of certificated personnel to recommend policies which affect certificated personnel, must the county board hear from all work levels affected by the policies before adopting them?

Section 230.22, F. S., provides in part:

General powers of county board.—The county board, after considering recommendations submitted by the county superintendent, shall exercise the following general powers:

(1) DETERMINE POLICIES.—The county board shall determine and adopt such policies as are deemed necessary by it for the efficient operation and general improvement of the county school system. In arriving at a determination of policies affecting certificated personnel, the county board *may appoint or recognize existing committees composed of members of the teaching profession,* as defined in the professional teaching practices act, §§231.54-231.59. When such committees are involved in the consideration of policies for resolving problems or reaching agree-

ments affecting certificated personnel the committee membership shall include certificated personnel representing all work levels of instructional and administrative personnel as defined in the school code. (Emphasis supplied.)

Section 447.03, F. S., provides:

Employees' right of self-organization.—Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Section 839.221, F. S., provides, in part:

Governmental officers and employees; prohibited participation in strikes or membership in organizations that assert right to strike against government employer.—

(1) No person shall accept or hold any office, commission or employment in the service of the state, of any county or of any municipality, who:

(a) Participates in any strike or asserts the right to strike against the state, county or any municipality; or

(b) Is a member of an organization of government employees that asserts the right to strike against the state, county or any municipality, knowing that such organization asserts such right.

(2) All employees who comply with the provisions of this section are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and *shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing.* No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization. (Emphasis supplied.)

Section 12, DR State Const. provides, in part:

. . . The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Taking into consideration the above-cited constitutional and statutory provisions, your questions are answered as follows:

Questions 1 and 2 are answered in the affirmative.

Question 3 is answered in the negative. Appointment or recognition of the advisory committees authorized by §230.22, F. S., is permissive, not mandatory.

Question 4 is answered in the affirmative provided said committees conform to the requirements of §230.22, F. S.

Question 5 is answered in the affirmative. Said committees must meet the statutory requirements of §230.22, F. S.

County school boards should establish reasonable procedures for the guidance and convenience of employees, employee committees or other persons who wish to present grievances, recommendations or other matters to the board.

066-48—May 5, 1966

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX—AGREEMENTS FOR SALE OF REAL PROPERTY WHICH PROVIDES NO PERSONAL LIABILITY OF THE PURCHASER FOR PAYMENTS

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Are agreements for the sale and purchase of real property for a specified consideration, but containing the provision that the purchaser is "under no personal liability to make any payments" on the purchase price coupled with a provision for forfeiture of payments made in case of default, intangible personal property subject to taxation under Ch. 199, F. S.?

Chapter 199, F. S., regulates the taxation of intangible personal property having a tax situs within the state. This chapter was revised and amended by Ch. 65-389. Under the definitions of "intangible personal property," contained in §199.01, F. S. 1963, and §199.011, F. S. 1965, such property is defined as "all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents." Intangible property is defined in Black's law dictionary, as "such property as has no intrinsic and marketable value, but is merely representative or evidence of value, such as certificates of stock, bonds, promissory notes and franchises." Many things, including newspaper subscription lists, the good will of a business, stock, bonds, accounts receivable, payments due under contracts, including contracts to sell and convey realty, bank accounts, certificates of deposit, evidences of money due or to become due, have been held to be intangible personal property (21A Words and Phrases, Perm. Ed., 705, *et seq.*). See also definition of intangible property in 73 C.J.S. 156, §5; and 21A Words and Phrases, Perm. Ed., 705-712. We are of the opinion that the agreements for the sale and conveyance of real property, here under consideration, are subject to classification as intangible personal property under general definitions of intangible personal property. This is in accord with our opinion 062-148, of Nov. 7, 1962.

Prior to the general revision, amendment and reenactment of Ch. 199, F. S., by Ch. 65-389, as well as after said revision, amendment and reenactment, said Ch. 199 divided intangible personal property into 4 classifications, designated as Classes "A," "B," "C," and "D." Classification "D" embraces such intangibles as may not be classified under one or more of the other three classifications. This classification embraces all items of intangible personal property that may have a tax situs in this state. Except for the provision in the contracts before us for no personal liability of the purchaser, such contracts would be subject to classification as Class "C" intangibles (Jasper v. Orange Lake Homes, Inc., Fla. App., 151 So.2d 331; certiorari denied, Fla., 155 So.2d 694). Here only the property described in the agreement for deed is actually charged with the payment of the obligation mentioned in the said agreement. Generally, the procedure for enforcing payments secured by a lien or mortgage is by the foreclosure of the obligation and lien against the lands securing the payment of the said purchase price. Here there appears to be an obligation of the lands, but not of the vendee personally. As to the right of a vendor to foreclose such an agreement, see Mannion v. Owen, Fla. App., 121 So.2d 816; and 92 C.J.S. 372 and

373, §420. Whether the lands described in the agreement, or the unpaid obligation, is the most valuable, or of equal value, would appear to play a material part in determining the fair market value of the intangible arising from the creation of the agreement. This would be material in determining the value of the interest of the parties to the agreement.

Under former §199.05, F. S., the measure of taxable value of an intangible was its "full cash value," but under §199.081, F. S., 1965, which became effective on Jan. 1, 1966, the taxable value of an intangible is "just valuation." This term, as applied to real property, was held in Walter v. Schuler, Fla., 176 So.2d 81, text 85 and 86, to have the same meaning as "fair market value." In said Walter v. Schuler, *supra*, and in Tyson v. Lanier, Fla., 156 So.2d 833, the Sup. Ct. considered the said three terms as being legally synonymous. It, therefore, appears that the taxable value of an agreement to sell and convey real property is its fair market value (see Walter v. Schuler, *supra*). Where the purchaser is personally liable for the purchase price, under the terms of the agreement, this fact should be taken into consideration in fixing the fair market value of the contract to the seller, and his solvency should be presumed unless it is made to appear otherwise by the owner of that contract or is apparent to the assessor of taxes. However, when the purchaser has assumed no personal liability for the purchase price, his solvency and worth may not be taken into consideration in fixing the fair market value of the agreement.

It appears that such an agreement, where the purchaser has assumed no personal liability therefor, should be fixed at its fair market value, which term is synonymous with full cash value and just value, defined in Walter v. Schuler, *supra*, as the amount a purchaser willing but not obliged to buy, would pay to a seller willing but not obliged to sell; that is, two persons dealing at arm's length. If a market has been established for such agreements for deed, then such market would appear to be the fair market value thereof; however, where no market has been developed for the said agreements, the question is one for the tax assessor to determine from the best information available. Oftentimes where there is no personal liability, there may be little, if any, market for such agreements. The value of the real property described in the agreement, as well as the unpaid balance, may be compared and taken into consideration. We realize that this is a difficult field for the tax assessor where there is no personal liability of the purchaser.

066-49—May 6, 1966

FLORIDA INSTALLMENT LAND SALES BOARD

REGULATION OF INSTALLMENT LAND SALES CONTRACTS—EXECUTION OF CONTRACT, WHAT CONSTITUTES

To: Jon C. Moyle, Counsel, Florida Installment Land Sales Board, Tampa

QUESTION:

Does the payment of money by a purchaser for the reservation of a lot, prior to the date that the purchaser has conducted a personal inspection of the property, constitute the execution of an installment land sales contract?

Section 478.021(2), F. S., was amended by the 1965 legislature (Ch. 65-274) and provides in part as follows:

Installment land sales contract means any money, receipt, certificate, contract or any instrument in writing evidencing an

> arrangement or agreement whereby the purchase price for real property or any interest therein is amortized by periodic payments and the conveyance with recordation in public records of legal title to the purchaser thereof is deferred; provided, however, that exempted from the provisions of this act are those developers or sellers, who, at all times during the life of the agreement of purchase and sale have clear title and are immediately prepared to convey clear title to the purchaser, and have completed all improvements promised, if any, and the land sold is useful for the purpose for which it is offered and *the purchaser has personally inspected the property to be purchased prior to the execution of the agreement and has so certified in writing.* (Emphasis supplied.)

Section 478.121, F. S., requires that all persons engaging in the sale of real property by way of installment land sales contract as defined above register with the Florida installment land sales board and receive a registration certificate pursuant to the provisions of Ch. 478. Without such a certificate, no such sales can be legally made in this state, unless the exemption proviso of §478.021(2), F. S., is applicable.

It is my understanding, from the facts which you have submitted to me and a copy of the promotive publication used by a company known as Hasty-Greene Investments, Inc., that some difficulty has arisen in interpreting the following language contained in §478.021(2), F. S.:

> . . . and the purchaser has personally inspected the property to be purchased prior to the execution of the agreement and has so certified in writing.

The promotive publication which you have attached to your letter contains an application whereby the person receiving the publication can reserve one or more "camp sites" by filling out and returning the application, and states that he will, at some subsequent date, inspect the said camp site. The person making this reservation is required to submit an amount of $10.00 for this camp site reservation. The Hasty-Greene Company agrees to refund the said $10.00 if the person is not completely satisfied.

The question now arises as to whether or not, by making this reservation, an installment land sales contract has been executed. An executed contract is one in which the object of the agreement has been performed and everything that was to be done has been done (12 Am. Jur., Contracts, §9). There must be a common or mutual intention in order to form a binding contract. It is necessary that there be a meeting of the minds as to all of the terms of the contract. So long as any essential matter remains open for further consideration there is no completed contract (Mann v. Thompson, 100 So.2d 634). Where the parties are merely negotiating as to terms of an agreement to be entered into at some future date, there is no meeting of the minds and, consequently, no executed contract while the agreement is incomplete.

As has been stated above, in order to engage in the sale of real property in this state by way of installment land sales contract, as defined in Ch. 478, a person must first register with the installment land sales board. However, there exist certain exemptions to this requirement due to the language of §478.021(2), F. S. If a developer or seller is to come within the provisions of these exemptions, the burden is upon him to show that his operation falls within the requirements enacted by the 1965 legislature. With specific reference to the section of this exemption proviso with which you have experienced difficulty in

interpreting, it is my opinion that the language is clear. The said language requires that the purchaser personally inspect the property to be purchased prior to the execution of the agreement and so certify in writing.

The promotive publication which you have attached to your letter, in my opinion, would not be a binding or executed land sales contract when the above discussed reservation form is filled out by the prospective purchaser and returned to the Hasty-Greene Investments, Inc. At this stage of the negotiations, the prospective purchaser has merely reserved an undetermined number of camp sites and agreed that on some subsequent date he will inspect the said camp sites. The Hasty-Greene company has agreed to reserve this property and to return the $10.00 reservation fee if the prospective purchaser is not satisfied. This does not indicate a common intention upon the part of the prospective purchaser and Hasty-Greene Investments, Inc., at this stage of the negotiations, to enter into an executed and binding land sales agreement, and without mutual agreement there exists no binding land sales contract.

There are two ways in which this company can legally make sales of the land described in the promotive publication by way of installment land sales contract: (1) register with the installment land sales board as required by §478.121, F. S., or (2) meet all of the exemption provisions set out in §478.021(2), F. S.

Your question is answered in the negative.

066-50—May 9, 1966

UNIFORM COMMERCIAL CODE

SECURED TRANSACTIONS—MATTERS EXCLUDED FROM APPLICATION OF CHAPTER 679, F. S.

To: Curtis R. Barnes, Clerk Circuit Court, Brevard County, Titusville

QUESTION:

Are the requirements as to filing of financing statements and other instruments under Ch. 679, F. S., of the Florida Uniform Commercial Code applicable to secured transactions between a credit union and its members?

Section 679.9-104, F. S., provides in part:

Transactions excluded from chapter.—This chapter does not apply:

* * * * *

(11) To a transfer in whole or in part of any of the following: . . . any deposit, savings, passbook or like account maintained with a . . . credit union or like organization.

It seems clear that these exclusions apply only to those transactions in which rights under such "deposits, savings, passbook or like account" are put up as collateral. Such transactions are often quite special, do not fit easily under a general commercial statute and are adequately covered by other laws. (See Uniform Commercial Code comment under §679.9-104, F. S. A.) It seems equally clear that these exclusions do not apply to transactions in which the collateral is property other than rights under such deposit, savings, passbook or like account.

066-51—May 13, 1966

HOTEL AND RESTAURANT COMMISSION

CONSTRUCTION OF PUBLIC LODGING OR PUBLIC FOOD ESTABLISHMENTS—REQUIREMENT AS TO PLANS BY REGISTERED ARCHITECT

To: William J. Hamrick, Commissioner, Florida Hotel and Restaurant Commission, Tallahassee

QUESTION:

What interpretation should be given the proviso contained in §509.211(4), F. S., in view of the language in §467.09(1), F. S.?

Section 509.211(4), F. S., requires that before any public lodging or public food service establishment is erected or remodeled: "registered architect's plans or registered engineer's plans, with detailed specifications, shall be approved by the supervising architect or engineer of the hotel and restaurant commission." Said subsection (4) contains the following exception to the foregoing:

> . . . Provided further, that new construction or remodeling costing *ten thousand dollars or less need not be* accompanied by plans of a *registered* architect or engineer but scaled drawings shall be submitted to the hotel commission's architect or engineer for approval, as a condition precedent to securing a building permit. (Emphasis supplied.)

Section 467.09(1), F. S., exempts certain persons from being registered as an architect as follows:

> No person shall be required by this or any other state law regulating the practice of architecture to qualify as an architect in order to make plans and specifications for or supervise the erection, enlargement or alteration of any building upon any farm for the use of any farmer, irrespective of the cost of such building, or any one- or two-family residence building or any domestic out-building appurtenant to any such one- or two-family residence, regardless of costs, *or any other type building costing less than five thousand dollars* (except schools, auditoriums, or other buildings intended for the mass assemblage of people). . . . (Emphasis supplied.)

In construing statutes, courts have the duty to find for conflicting statutory provisions a reasonable field of operation which may preserve the force of each statute and cause them to harmonize if possible by any fair, strict or liberal construction. (Orlando Transit Co. v. Florida R.R. and Public Utilities Comm., 37 So.2d 321.) A statute relating to the particular part of a general subject will operate as an exception to, or qualification of, the general terms of a more comprehensive statute to the extent only of the repugnancy. (Adams v. Culver, 111 So.2d 665.)

In keeping with the foregoing principles of statutory construction and in an effort to preserve the force of each of the aforementioned statutes, it is my opinion that §467.09(1), *supra*, is qualified by §509.211-(4), F. S., insofar as plans and specifications for the erection or remodeling of public lodging or public food service establishment is concerned. It appears to have been the legislative intent not to require submission of plans prepared by a registered architect or engineer where the cost of new construction or remodeling of a public lodging or public food service establishment does not exceed $10,000; notwithstanding the

limitation of $5,000 generally contained in §467.09(1), F. S. It cannot be presumed that the legislature would enact §509.211(4), F. S., without having some definite purpose in view. (See Webb v. Hill, 75 So.2d 596.)

It is my understanding that the foregoing interpretation of the proviso contained in §509.211(4), F. S., is consistent with the long-standing construction which the commission has placed on this statute and accordingly is entitled to great weight.

Your question is, therefore, answered accordingly.

066-52—May 26, 1966

UNIFORM COMMERCIAL CODE

SECURED TRANSACTIONS—FILING; REQUISITES—DOCUMENTARY STAMP TAX

To: S. Morgan Slaughter, Clerk Circuit Court, Duval County, Jacksonville

QUESTIONS:

1a. Under the provisions of §§679.9-4011 and 679.9-401-(1)(b), F. S. (Uniform Commercial Code), must financing statements listing fixtures as collateral be recorded either in "Record of Mortgages" or "Official Records," as provided in §§28.22 and 28.221, F. S.; or may they be recorded in some other record book "as shall be designated by the clerk of the circuit court for such purpose?"

b. May chattel mortgages and similar precode documents evidencing security interests in personalty continue to be filed for record and, if so, in what record book or books shall they be recorded?

2. Is there a conflict between §28.221, F. S., on the one hand, and §§679.9-401 and 679.9-4011, F. S., on the other hand?

3. Under the provisions of §679.9-405(2), F. S., pertaining to assignments of a security interest, would a copy of such an assignment without original signatures be acceptable for recording?

4. What are the requirements as to documentary tax stamps with reference to the recording of financing statements?

AS TO QUESTION 1a.:

As you mention in your letter, §679.9-4011, F. S., provides that the filing requirements of Ch. 679 (Art. 9) of the Uniform Commercial Code ". . . shall be complete and sufficient only if the writing is recorded . . . in such record book as shall be designated by the clerk of the circuit court for such purpose."

Section 679.9-401(1) (b), F. S., provides:

> (b) When the collateral is goods which at the time the security interest attaches are or are to become fixtures, then *by recording* in the office *and in the record where a mortgage* on the real estate concerned would be recorded; (Emphasis supplied.)

Official comment 6 under §679.9-303, F. S. A., states:

> Under this Article as under the Uniform Sales Act the place of filing with respect to goods affixed or to be affixed to realty is *with the real estate records and not with the chattel records.* (Emphasis supplied.)

From the foregoing, it would appear that, in order to meet the re-

quirements of §679.9-401(1)(b), F. S., a financing statement related to a security interest in which any part of the collateral is fixtures must be recorded not only in the office where a mortgage on the real estate concerned would be recorded, but in the same record book as that in which it would be recorded if it were actually a mortgage; i.e., either in the "Record of Mortgages" under the provisions of §28.22, F. S., or the "Official Records" as provided in §28.221, F. S.

AS TO QUESTION 1b.:

Although such instruments as "chattel mortgages," etc., may continue to be used by the parties to a secured transaction, the Uniform Commercial Code does not require the recording of such instruments as such. All that need be filed ("file" being synonymous with "record" under the Florida version of the code), when filing is required or permitted for perfection of a security interest, is a document or instrument designated as a "financing statement." The purpose of the prescribed form for a financing statement in §679.9-402(2), F. S., is merely to provide minimum standards to comply with the provisions of Ch. 679. Thus, the parties may file, as a financing statement, the security agreement itself, be it chattel mortgage, conditional sales contract, or other precode or noncode form, so long as it meets (as such forms generally do) all of the requisites of §679.9-402, F. S. As to the book in which such recording is to be made, see the answer to question 1a. above.

AS TO QUESTION 2:

There appears to be no conflict between §28.221, F. S., on the one hand, and §§679.9-401 and 679.9-4011, F. S., on the other. In any event, except as specifically provided otherwise, any provision of the code would take precedence over any other Florida law inconsistent therewith. See §§680.10-103 and 680.10-104, F. S.

AS TO QUESTION 3:

Section 679.9-405(2), F. S., provides in part:

> (2) A secured party may assign of record all or a part of his rights under a financing statement by the filing of a separate written statement of assignment *signed by the secured party* of record . . . *and the debtor*, . . . A copy of the assignment is sufficient . . . *if it complies with the preceding sentence*. . . . (Emphasis supplied.)

From the foregoing, it would appear that a carbon copy of an assignment embodying all of the requirements of §679.9-405(2), F. S., and bearing original signatures may be accepted for record. See AGO 063-108, citing 65 A.L.R. 351, in which the following appears:

> "Where a carbon copy of a writing is signed . . . it ranks as a duplicate original *as would a copy produced by any other method* and formally signed . . ." (Emphasis supplied.)

The italicized words in the above quotation would seem to indicate that if the copy submitted has been "produced by any other method" (such as xerox or other photostatic or photographic process) and bears original signatures, or if the original instrument bore original signatures when copied by any such process, such copy may be accepted for record, provided it otherwise qualifies under §679.9-405(2), F. S., as noted above. See also §92.35, F. S., the uniform photographic copies of business and public records as evidence act, the general intent of which would appear to be consistent with the above conclusions.

AS TO QUESTION 4:

Section 680.10-102(2), F. S., amends Ch. 201, F. S., excise tax on documents, by adding §201.22, F. S., financing statements under Ch. 679 of the Uniform Commercial Code. This new section provides that the excise tax on documents shall be applicable to transactions under the

code and that a clerk "shall not accept for (record) any financing statement . . . unless there appears thereon the notation that the stamps required by (Ch. 201) have been placed on the promissory instrument (to which it relates) and will be placed on any additional promissory instruments, advances or similar instrument that may be secured by said financing statement."

Your questions are therefore specifically answered as follows:

1a. Financing statements listing fixtures as collateral must be recorded either in "Record of Mortgages" books under §28.22, F. S., or in "Official Records" book under §28.221, F. S.

b. Chattel mortgages and similar precode documents evidencing security interests in personalty may continue to be filed for record as "financing statements," in either "Record of Mortgages" or "Official Records."

2. There appears to be no conflict between Uniform Commercial Code §§679.9-401, 679.9-4011, and §28.221, F. S.

3. A carbon copy of an assignment of a security interest may be accepted for record if it bears original signatures of both parties. A copy of such an assignment by xerox or other photographic process may be accepted for record if the original, when reproduced, was signed by both parties or if the copy when filed for record bears original signatures of both parties.

4. Excise tax on documents is applicable to transactions under the code and a financing statement may not be accepted for record unless it bears a notation that stamps have been placed on the proper instrument.

066-53—May 26, 1966

EDUCATION

PERSONNEL COUNTY SCHOOL SYSTEM—CONTINUING CONTRACTS—COMPUTATION OF TIME OF SERVICE

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

STATEMENT OF FACT:

Section 228.041(24), F. S., defines a year of service for the purpose of granting continuing contracts and for administering the state program of education under the minimum foundation program. In the light of this law, please render an opinion on the following questions:

QUESTIONS:

1. If regular full-time teachers are required to render 7 hours per day for 196 days, would a teacher who worked only 4 hours per day for 196 days establish a year of service?

2. May a teacher's service rendered under a regular 10 months contract as provided in §236.02(3), F. S., be combined with service rendered under a separate contract for the summer program as provided in §236.07(3)(c), F. S., to establish a year of service?

3a. If service rendered under a separate contract for the summer program must be combined with service rendered under the regular 10 months contract, should such additional service be added to that of the prior or to that of the next school term?

b. If all full-time contractual service must be counted, would the base for determining a year of service for a 10

months contract employee who works 6 weeks in the summer program be 226 or 196 days?

Section 228.041(24), F. S., provides:

YEAR OF SERVICE.—The minimum time which may be recognized in administering the state program of education, not including retirement, as a year of service by a school employee *shall be full-time actual service* and beginning July, 1963, such service shall also include sick leave for which compensation was received but excluding all other types of leave and holidays *for a total of more than one half of the number of days required for the normal contractual period of service for this position held, which shall be one hundred ninety-six days or longer, or the minimum required for the county to participate in the minimum foundation program in the year service was rendered or the equivalent for service performed on a daily or hourly basis;* provided further that absence from duty after the date of beginning service shall be covered by leave duly authorized and granted; provided further that the county board of public instruction shall have authority to establish a different minimum for local county school purposes. (Emphasis supplied.)

It is noted that a year of service as defined above ". . . shall be full-time actual service . . ." (including sick leave.)

If regular full-time teachers are required to render 7 hours service per day, it would seem apparent that teachers employed to teach 4 hours per day must be classified as "part-time" rather than "regular teachers."

Question 1 is answered in the negative.

Section 228.041(19), F. S., defines the school year as follows:

SCHOOL YEAR.—*The school year shall comprise the period during which the schools are regularly in session for the minimum number of one hundred eighty days for pupils plus periods for pre-school and post-school conferences during any school fiscal year beginning on or after July 1 and ending on or before June 30;* provided that the state board may in special cases on application by the county board approve a school year which begins not to exceed ninety days before the beginning of the school fiscal year. (Emphasis supplied.)

The school year as defined above begins ". . . on or after July 1 and ending on or before June 30"

It is therefore my opinion that if a teacher is under 10 months contract and complies with the contract, he would be entitled to credit for a year's service for the purpose of granting a continuing contract.

The fact that the teacher worked additional time during the same year under a separate contract could not reasonably be construed so as to establish more than a year's service (which he had already achieved under his 10 months contract.)

By the same token, the supplemental summer work, having occurred during the school year as defined by law, could not be added to his next year's service since it would occur in a different school year.

Question 2 is answered in the negative.

Questions 3a. and b. are answered the same as question 2.

066-54—May 26, 1966

EDUCATION

PERSONNEL COUNTY SCHOOL SYSTEM—TERMINAL PAY

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

Does §231.40, F. S., permit a county board of public instruction to provide terminal pay to all instructional personnel?

Section 231.40(1), F. S., provides:

> EXTENT OF LEAVE.—*Each member of the instructional staff employed on a full-time basis shall be entitled to ten days of sick leave at the beginning date of employment or at any time during any school year;* provided, that such leave shall be taken only when necessary because of sickness as herein prescribed. Such sick leave shall be cumulative from year to year; provided, that no more than one hundred twenty days of sick leave may be accumulated including sick leave for the current year; provided that not more than eighty school days may be claimed for sick leave in any one school year; and provided further that at least half of this cumulative leave must be established within the county granting such leave. *County school boards of the several counties may establish policies which will allow a teacher two days in each year for religious holidays; provided that the use by the teacher of such days for religious holidays shall be charged to the sick leave provided for herein;* and provided, further, that leave for religious holidays shall be noncumulative. *County school boards of the several counties may also establish policies which will provide terminal pay to a teacher at normal retirement, or to his beneficiary if service is terminated by death, such terminal pay not to exceed an amount determined by the daily rate of pay of the teacher at retirement or death, multiplied by one half the total number of accumulated sick leave days credited to the teacher at time of retirement or death.* (Emphasis supplied.)

This act provides for the accumulation of sick leave for the "instructional staff."

Section 228.041(11), F. S., defines instructional personnel as follows:

> Instructional personnel comprises the members of the instructional staff and includes supervisors, principals, teachers, librarians, and others engaged in an instructional capacity in the schools.

Section 231.40(1), F. S., uses the words "instructional personnel" and "teacher" interchangeably. It is my opinion that it was clearly the intent of the legislature to authorize terminal leave for all instructional personnel as defined and not limit such authority solely to persons whose sole duties are limited to full-time classroom instructors at the time of death or retirement.

This construction is not only consistent with the apparent legislative intent but accepted academic usage of "instructional personnel" and "teachers" as well.

Your question is answered in the affirmative.

066-55—May 31, 1966

TAXATION

SALES TAX REFUNDS OR CREDITS—WHEN PAYABLE OR ALLOWABLE

To: J. Ed Straughn, Director, State Revenue Commission, Tallahassee

QUESTIONS:

1. Where a dealer sells merchandise on open account and later writes off the sale in whole or in part as a bad debt; or sells merchandise under a retain title or similar contract, and subsequently repossesses the property; is such a dealer entitled to a refund of all or any of the taxes so paid?

2. If such dealer is entitled to a refund of taxes so paid, when does his right to such refund accrue under §215.26, F. S.?

It is provided in and by the caption paragraph of §212.05, F. S., that: ". . . the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes . . ." such tangible personal property for a consideration, such sales or rentals to be taxable at the rate of 3% of the sales or cost price of the said tangible personal property, or the rental or lease price thereof. The "sale," as used in said Ch. 212, F. S., is defined in §212.02(2), F. S.:

(2) Sale means and includes:

(a) Any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration . . .

* * * * *

A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price, shall be deemed a sale.

In §212.02(4), F. S., "sales" price is defined as meaning "the total amount paid for tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller . . ."

It is provided in §212.06(1), F. S., that: "The aforesaid tax at the rate of three per cent of the retail sales price, as of the moment of sale, or three per cent of the cost price, as of the moment of purchase, . . . shall be collectible from all dealers as herein defined on the sale at retail, . . . The full amount of the tax on credit sales, installment sales and sales made on any kind of deferred payment plan shall be due at the moment of the transaction in the same manner as a cash sale." The last above sentence was added by §1, Ch. 61-275, and may have been intended to bring an end to practices followed by some prior to the enactment of the 1961 act. Section 212.17(1), F. S., insofar as here material, provides that:

In the event purchases are returned to the dealer by the purchaser or consumer after the tax imposed by part I of this chapter has been collected, or charged to the account of the consumer or used, the dealer shall be entitled to reimbursement of the amount of tax collected or charged by him, in the manner prescribed by the commission; and in case the tax has not been remitted by the dealer to the commission, the dealer may deduct

the same in submitting his return upon receipt of a signed statement of the dealer as to the gross amount of such refunds during the period covered by said signed statement, which period shall not be longer than ninety days . . .

The last above-quoted provision from §212.17(1), F. S., which has remained unchanged since its original enactment as §17, Ch. 26319, 1949, must be read in the light of, and construed with the last sentence of §212.06(1), F. S., above-mentioned, providing that: . . . "The full amount of the tax on credit sales, installment sales and sales made on any kind of deferred payment plan shall be due at the moment of the transaction in the same manner as a cash sale." which was added to said subsection by §1, Ch. 61-275, and is the controlling statute in case there be a conflict between it and the above-quoted portion of §212.17(1), F. S.

Generally, "unless the law requires it, no notice or demand is required to fix the duty of the citizen to pay his taxes" (84 C.J.S. 1219, §607, note 45). "It has generally been held that where goods conditionally sold are repossessed for nonpayment of the purchase price, the payor is not entitled to a credit or refund of the tax on the unpaid portion of the purchase price." (53 C.J.S. 698, 257, notes 92 and 93). "Most sales tax statutes contain their own definitions of the term 'sale at retail' or have certain clauses which have the effect of defining it in part, and usually these definitions enlarge upon the common acceptance of the term and often expressly include within their scope transactions which would not ordinarily be considered sales." (47 Am. Jur. 228 and 229, §24).

When we take into consideration the definitions of sale, retail sale, etc., contained in §212.02, F. S., the provision in §212.06(1), F. S., that: . . . "The full amount of the tax on credit sales, installment sales and sales made on any kind of deferred payment plan shall be due at the moment of the transaction in the same manner as a cash sale." and other provisions in Ch. 212, F. S., we reach the conclusion that goods sold on open account, as well as sales on retain title or similar contracts or agreements, whether written off as constituting bad debts, or repossessed or otherwise taken under conditional sale, retain title, or other like agreements, are nevertheless sales under said Ch. 212, F. S., and sales taxes in the full amount or consideration for said sales or transactions become immediately due and payable.

The above-mentioned provision copied from §212.17(1), F. S., when read and construed with Ch. 212, F. S., generally seems to relate to goods and merchandise returned by the purchaser or customer to the dealer where the transaction has not been closed, or where the goods and merchandise are returned because of defects or deficiencies therein, and has no application after the sales, rental, or other transaction has been closed, or to contracts where the goods or merchandise have been retaken by the seller or those claiming under him for default or nonpayment, or where the goods or merchandise have been retaken through legal process, and such a transaction does not appear to be within the purview of §212.17(1), F. S.

The provision in §212.06(1), F. S., that: . . . "The full amount of the tax on credit sales, installment sales and sales made on any kind of deferred payment plan shall be due at the moment of the transaction in the same manner as a cash sale." doubtless was added by §1, Ch. 61-275, to correct a practice of collecting the taxes on retail installment sales or conditional sales and paying the same over to the commissioner as and when the installment payments were made on such contracts, by which practice future installments not having been made after a default or a

retaking of the property by the dealer or his grantee were never paid to the state, which we have been informed was the practice in instances. Under the said 1961 amendment taxes are due upon the making of the said contracts or agreements.

In the light of the above and foregoing, questions 1 and 2 are answered as follows:

Question 1 is answered in the negative, the said taxes having accrued and become payable upon the making of the transactions mentioned.

2. When and if a dealer is entitled to sales taxes paid by him, which right is dependent upon the applicable facts and circumstances in each separate case, such right to a refund accrued when the said taxes were paid to the collecting state agency, and the limitation upon the time within which an application for a refund is to be made under §215.26, F. S., runs from the date of such payment (State v. Gay, Fla., 74 So.2d 560, 46 A.L.R. 2d 1340).

066-56—May 31, 1966

MOTOR VEHICLES

CERTIFICATES OF TITLE OF HOUSE TRAILERS AND MOBILE HOMES ATTACHED TO REALTY

To: Arch Livingston, Director, State Department of Motor Vehicles, Tallahassee

QUESTION:

> **Where a certificate of title has been issued by the department of motor vehicles covering a trailer coach or mobile home and thereafter such vehicle becomes permanently affixed to land and taxable as real property, should the certificate of title, under the provisions of Art. IX, §13, State Const., and §§320.-081 and 319.20, F. S., be surrendered to the department for cancellation, together with satisfaction of all liens noted thereon, or should the certificate of title continue to remain outstanding?**

Although Ch. 7737, 1917, made provision for the registration and reregistration of motor vehicles, such registration was more concerned with the registration of such vehicles for purposes of license taxes and the enforcement of the license tax laws relating to motor vehicles. The present plan in Florida of the issuance of title certificates to the owners of motor vehicles appears to have originated as Ch. 9157, 1923, which was brought into the Florida Statutes, 1941, as §§319.01-319.13, thereof. This law was supplemented by Chs. 20226 and 20917, 1941, which were brought into the Florida Statutes, 1941, as §§319.14-319.19, F. S.

Motor vehicle title certificates are a proper subject for legislative action and are designed for the protection of the public. 60 C.J.S. 177, *et seq.*, §42; 7 Am. Jur. 2d 615-617, §24. This system of motor vehicle registration is similar to the so-called Torrens system of registering title to real property, referred to in 76 C.J.S. 525, §1. Motor vehicle title certificates in Florida are included in Ch. 319, F. S. See also §318.031(2), F. S., relating to the issuance and cancellation of motor vehicle certificates of title by the director.

Section 319.20, F. S., classifies trailers as including "trailer-coaches," defining a "trailer coach" as "a trailer or semitrailer so designed and equipped as to provide living or sleeping facilities or housing accommodations." which includes mobile homes. Such trailers are classified as "motor vehicles" by §13, Art. IX, State Const., as amended at the gen-

eral election in Nov. 1965, so that the provisions in §318.031(2), and Ch. 319, F. S., relative to title certificates for motor vehicles are applicable. Said §13, Art. IX, State Const., as amended, makes trailer coaches and mobile homes "motor vehicles" for purposes of licenses and license taxes. Title certificates issued as evidence of the title to trailer coaches and mobile homes is the evidence of the owner's title thereto, as well as his chain of title thereto. Like a title certificate to an automobile, it is the owner's evidence of title as well as his chain of title. The records of the department of motor vehicles constitute the chain of title to the certified vehicle, including trailer coaches and mobile homes, like the records of a Torrens land registration office constitutes the owners' chain of title.

An examination of the title to Ch. 9157, 1923, reveals that it related entirely to the title of motor vehicles, and the titling of the same, the regulation of the purchase, sale and transfer of ownership of motor vehicles, and no provision was made in the said 1923 enactment as to the annual registration of such motor vehicles and the license taxes to be paid in connection therewith. The provisions for registration, licensing and license taxes against motor vehicles were in existence prior to the enactment of said Ch. 9157, 1923, as will appear by reference to Ch. 7275, 1917; Ch. 6881, 1915, and Ch. 6212, 1911. Although the statutes relating to title certificates for motor vehicles may be a great aid in the administration of the statutes and laws imposing license and license tax requirements on motor vehicles, such statutes are not in fact part and parcel of the statutes imposing licensing and license tax requirements on motor vehicles. The two laws are separate and distinct laws. It would seem to be within the jurisdiction and power of the state legislature to permit the registration of the title of many types of tangible personal property in addition to motor vehicles, should the legislature so determine.

The above-stated question should be answered in the negative. Any cancellation of existing title certificates (as evidence of title) as well as the mandatory cancellation of liens, against the will or consent of the owner or the lien holder would raise serious constitutional questions, especially under the contract clause of the U. S. Const., and under present existing statutes and laws.

066-57—June 1, 1966

EMINENT DOMAIN

CONSTRUCTION OF CHS. 65-346 (§74.05, F. S.) AND 65-369 LAWS OF FLORIDA (§74.051, F. S.)

To: Robert J. Smith, Assistant City Attorney, Fort Lauderdale

QUESTION:

> **Should the provisions of §74.05, F. S., be construed so as to override the provisions of §74.051, F. S., or should §74.051, F. S., be construed so as to override the provisions of §74.05, F. S.?**

Both sections of Ch. 74, F. S., contain parts which set forth a deposit which is to be required in certain instances where eminent domain proceedings are utilized. Section 74.051, F. S., where relevant states:

> . . . Said deposit shall not be less than double the amount of the *petitioner's estimate of value*, except (in certain instances) . . . said deposit shall not be less than the amount of the *petitioner's estimate of value*. (Parenthetical matter and emphasis supplied.)

Section 74.05, F. S., where applicable states:

> . . . which said deposit shall not be less than double the value as fixed by the *appraisers appointed by the court;* except (in certain instances) . . . deposit shall not be less than one hundred per cent of the value as fixed by the *court-appointed appraisers.* (Parenthetical matter and emphasis supplied.)

We note that §74.031, F. S., (§4, Ch. 65-369) provides in part:

> . . . The petitioner shall make a good faith *estimate of value,* based upon a valid appraisal of each parcel in the proceeding, which shall be made a part of the declaration of taking. (Emphasis supplied.)

Section 74.03, F. S., 1963, now repealed by the revision, provided for a clear and explicit method by which the court could appoint appraisers. Chapter 74 as revised does not provide a method for the appointment of appraisers by the court.

An examination of the legislative journals reveals the following history:

1. Section 74.05, F. S., has its history in Ch. 65-346, Laws of Florida. Section 74.051, F. S., has its history in Ch. 65-369, Laws of Florida.

2. Chapter 65-369, Laws of Florida, amounted to a general revision of Chs. 73 and 74, F. S. Chapter 65-346, Laws of Florida, only related to §74.05, F. S.

3. Both Chs. 65-346 and 65-369, Laws of Florida, were presented to the legislature by the same man, Rep. Greene.

4. Chapter 65-369, Laws of Florida, took effect on Oct. 1, 1965. Chapter 65-346, Laws of Florida, took effect on Aug. 3, 1965.

5. Chapter 65-346, Laws of Florida, was presented with a companion bill, Ch. 65-345, Laws of Florida. Both of these related to canal companies.

6. The only change which Ch. 65-346, Laws of Florida, made in §74.05, F. S., as it existed prior to 1965 was to add the phrase, "or for canal purposes."

The answer to the question posed would be difficult to ascertain were it not for §74.121, F. S., which provides:

> This act shall take effect on October 1, 1965, and shall apply to *all* eminent domain proceedings filed after that date. (Emphasis supplied.)

Therefore, it is the opinion of this office that §74.05, F. S., was repealed by the enactment of §74.051, F. S., and §74.121, F. S., making the general revision enactment applicable to all proceedings under Ch. 74, F. S., insofar as there is any conflict or inconsistency.

066-58—June 6, 1966

CITIES AND TOWNS

AUTHORITY OF MUNICIPALITY TO REQUIRE PLANS FOR PUBLIC BUILDINGS TO BE APPROVED BY ARCHITECT

To: Herbert L. Anson, Secretary-Treasurer, State Board of Architecture, Fort Lauderdale

QUESTIONS:

> **1. Where a county or municipality has a system of issuing building permits, may it require conformity with the state laws regulating architecture as a prerequisite to the issuance of a building permit?**

2. What effect does §467.09(3), F. S., enacted during the 1965 session of the legislature, have on AGO 064-84, dated July 6, 1964?

AS TO QUESTION 1:

Section 467.09(3), F. S., enacted during the 1965 session of the legislature as Ch. 65-50, placed a new duty upon those counties and municipalities having a system of issuing building permits. Section 467.09(3), F. S., now provides:

> In counties or municipalities which now or hereafter have a system of issuance of building permits such permits shall not be issued in any case where the application for said building permit discloses that the provisions of this chapter have been violated; *provided, however, this shall not authorize the withholding of building permits in any cases within the exempt classes set forth under subsection (1).* (Emphasis supplied.)

Pursuant to the above provision §467.09(1), F. S., exempts certain classes set forth as follows:

> No person shall be required by this or any other state law regulating the practice of architecture to qualify as an architect in order to make plans and specifications for or supervise the erection, enlargement or alteration of any building upon any farm . . . any one- or two-family residence building or any domestic out-building appurtenant to any such one- or two-family residence . . . or of any other type building costing less than five thousand dollars (except schools, auditoriums, or other buildings intended for the mass assemblage of people). Nor shall anything in this or any other state law be held to prevent registered professional engineers or their employees or subordinates under their responsible supervising control from performing architectural services which are purely incidental to their engineering practice . . .

Prior to the 1965 amendment by the legislature a set of plans could be prepared by a person other than an architect or engineer even though the plans fell within the purview of the regulatory aspects of Ch. 467, F. S., and there was no statutory authority preventing the issuance of a building permit for such a structure. See AGO 064-84, p. 376 of the 1963-64 biennial report of the attorney general. Now, however, §467.09(3), F. S., prohibits a municipality or county from issuing a permit for a building when the application and plans do not show the seal and signature of an architect registered within the state, except in the exempted categories such as engineering.

In summary, the counties and municipalities which have a system of issuing building permits must require conformity with the laws regulating architecture as a prerequisite to the issuance of building permits, keeping in mind however those enumerated statutory exemptions found in Ch. 467, F. S.

Therefore, question 1 is answered accordingly.

AS TO QUESTION 2:

Prior to 1965 there was no provision in the laws of Florida authorizing a county or municipality to withhold issuance of a building permit if and when the plans were not prepared by an architect registered in Florida. This was the holding in AGO 064-84, dated July 6, 1964. However, since the enactment of §467.09(3), F. S., during the 1965 session of the legislature, cities and counties are now required, in certain instances, to withhold issuance of permits.

Based upon the foregoing, AGO 064-84, is modified accordingly.

066-59—June 6, 1966

DEPARTMENT OF PUBLIC SAFETY

AUTHORITY TO MAKE ARRESTS IN ACCIDENTS ON PRIVATE QUASI-PUBLIC AND PUBLIC PROPERTY THROUGHOUT THE STATE

To: H. N. Kirkman, Director, Department of Public Safety, Tallahassee

QUESTION:

Does the department of public safety have the authority to investigate and make arrests in accident cases occurring on privately owned property of shopping centers outside municipal boundary limits?

In Florida and the great majority of states, the driving and operation of a motor vehicle is a privilege subject to reasonable state regulations under the police powers in the interest of public safety and welfare. Thornhill v. Kirkman, 62 So.2d 740; Jones v. Kirkman, 138 So.2d 513.

More than forty-five years ago the Sup. Ct. of Fla., declared an automobile to be a dangerous instrumentality. Southern Cotton Oil Co. v. Anderson, 86 So. 629; 16 A.L.R. 255. The state legislature in an effort ". . . to protect the public safety by enlarging our sensitivity to road etiquette and our responsibility to the rights of others . . ." (Larson v. Warren, 132 So.2d 177) has enacted laws governing the operation of motor vehicles and has provided in §§324.051, 322.26 and 322.27, F. S., conditions for the suspension or revocation of a person's driving privilege. The revocation or suspension of a person's driving license is for the protection of the public and not as punishment for the offender. Smith v. City of Gainesville, 93 So.2d 105.

Increased automobile fatalities has been said to be one of the most impelling social problems confronting the general public. Thornhill v. Kirkman, *supra*. This is readily verified in Florida when we consider that there were 1,489 automobile fatalities in 1963; 1,545 automobile fatalities in 1964 and 1,665 automobile fatalities in 1965. This does not take into consideration the misery, pain and suffering of thousands injured or the untold millions in property damage. Thus it is imperative that law abiding motor vehicle operators be afforded every reasonable degree of protection.

Section 317.041, F. S., provides that: "The provisions of this chapter relating to the operation of vehicles refer to the operation of vehicles upon the state-maintained highway system and county-maintained highway system throughout this state including state-maintained municipal connecting link roads . . . *except that the provisions of §§317.071-317.211 shall apply upon highways and elsewhere throughout the state.*" (Emphasis supplied.) The provisions contained in §§317.071-317.211, F. S., which the legislature says shall apply on highways and elsewhere throughout the state, pertain to (1) accidents; (2) police officers authority to arrest at scene of accident; (3) driving while under the influence of alcoholic beverages, narcotic drugs, barbiturates or other stimulants; and (4) reckless driving. Conspicuously absent from the 16 sections covered in §§317.071-317.211, F. S., is any reference to "highways," "streets" or "roads." Thus, it is obvious that it was the intent of the legislature that those provisions contained in §§317.071-317.211, F. S., shall be applicable any place in Florida, be it private, quasi-public or public property.

Accidents, driving while under the influence of alcoholic beverages or drugs and reckless driving, are commonly referred to as the most serious offenses involving the regulation of traffic and of operation of motor vehicles. These offenses directly affect the welfare and safety of a motor vehicle operator and all persons and property that may come within his path of travel whether it be privately or publicly owned.

Section 317.012, F. S., provides as follows:

> *Administration and enforcement.*—The motor vehicle department, *department of public safety*, state road department, Florida public service commission *and law enforcement officers generally* are hereby authorized and directed to administer and enforce the provisions of this chapter applicable within their respective jurisdictions. (Emphasis supplied.)

Section 317.043, F. S., makes it unlawful for a municipality to pass or attempt to enforce any ordinance in conflict with the provisions of Ch. 317, F. S.

Section 186.04, F. S., known as the "Florida Model Traffic Ordinance," provides that it shall be the duty of the chief of police and police department of a municipality to enforce the provisions of the state vehicle laws applicable to traffic in their municipalities.

It would therefore appear, based upon the aforesaid decisions and statutes, to be the duty of the department of public safety to enforce the provisions contained in §§317.071-317.211, F. S., on all shopping centers, parking lots, drive-in theatres, motor courts, off-street parking areas, service stations and elsewhere throughout the state, outside a municipality's boundary limits and that it is the duty of a municipal police department to enforce these provisions within the municipal boundary limits. Your question is answered in the affirmative.

066-60—June 6, 1966

OCCUPATIONAL LICENSE TAXES

DANCE HALLS, VARIETY EXHIBITIONS, ETC.; EXEMPTIONS, HOTELS, MOTELS OF FIFTY UNITS OR MORE

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

> **1. Are hotels and motels of 50 or more licensed units, who serve meals in their dining room or rooms to unregistered guests, liable for license taxes under §205.37, F. S., when they operate for profit and permit dancing either to band, juke box, record player, radio or other means or device?**
>
> **2. Are hotels and motels of less than 50 licensed units liable to license taxes under said §205.37, F. S., when they operate as mentioned in question 1?**
>
> **3. Are private restaurants and dining rooms, unconnected with a hotel or motel, which permit dancing, at no extra charge, either to band, juke box, record player, radio or other means or device, liable to license taxes under said §205.37, F. S.?**

These questions involve the construction of §205.37, F. S., as amended by §2, Ch. 65-391, which section, insofar as here material, provides that:

> Every person who operates any place for profit where dancing is permitted, or entertainment, such as variety programs or exhibitions, is provided for a charge, shall pay a license tax of

one hundred dollars. The license required by this section shall be in addition to any other license required by law and the operation of such a place (of business) . . . shall not be construed to be incidental to some other (place of) business . . . ; provided, further, that this section shall not apply to hotels or motels, of fifty licensed units or more, paying an occupational tax as provided for in §205.29; . . . (Parenthetical matter supplied.)

The last above "provided, further," as contained in §205.37, F. S., 1961, as derived from Ch. 61-505, was as follows:

. . . provided, further, that this section shall not apply to hotels paying an occupational tax as provided for in §205.29; . . .

However, an examination of the authorities reveals that the last-quoted proviso in fact appeared in §205.37, F. S., 1941, and appears to have originated as §23, Ch. 18011, 1937. Under paragraph (j) of §15, Ch. 14491, 1929, all persons operating a public dance hall paid a license tax of $100; there being no exemption of dance halls operated by hotels or motels. The effect of the amendment of said §205.37, F. S., by §2, Ch. 65-391, was to impose the taxes mentioned in said §205.37, F. S., on dance halls owned and operated by owners of hotels and motels, except those having 50 licensed units or more which were exempted from the license taxes imposed by said §205.37, F. S. This has resulted in hotels and motels of less than 50 licensed units, and which operate a dance hall, having to pay a license tax under said §205.37, F. S., while hotels and motels of 50 or more licensed units, which operate dance halls, being exempted from the license taxes imposed by said §205.37, F. S.

The history of said §205.37, F. S., above-mentioned and discussed clearly indicates a legislative intent to exempt hotels and motels of 50 or more licensed units from the license taxes imposed by said section, although such exemption is not applicable to hotels and motels of less than 50 licensed units. These facts may pose a question of the equal protection of the laws as between the two classifications of hotels and motels; however, that is a constitutional question which this office for many years has left to the courts for final determination.

The exemption in said §205.37, F. S., is to hotels and motels of 50 or more licensed units and not to other classifications; and not to private restaurants and dining rooms unconnected with a hotel or motel.

1. Question 1 is answered in the negative.
2. Questions 2 and 3 are answered in the affirmative.

066-61—June 6, 1966

TRADING STAMPS

AUTHORITY OF COMPANY TO REFUSE TO REDEEM EXCHANGED STAMPS

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

May a trading stamp company doing business in this state, by written limitation in connection with the distribution of its trading stamps, prohibit the exchange of its stamps for other trading stamps through "stamp exchanges" or without its consent, and refuse to honor any of its trading stamps so exchanged for other trading stamps?

We are advised that such conditions against stamp exchanges are normally contained in "Saver Books" or other containers in which

stamps are pasted or otherwise preserved. We have before us what appears to be a copy of a page out of the merchants green trading stamp company's stamp book in which customers paste and preserve their stamps, on which the following appears:

> Title and right of possession of Merchants Green Trading Stamps are at all times reserved by the Company. They are furnished to our subscribers to be issued to customers, as evidence of purchases from merchants authorized to issue them; neither the stamps nor the books are sold to customers, nor are they to be sold, or transferred to any person without the written consent of the company.
>
> . . . Any other disposition of stamps or books without the written consent of the Merchants Green Trading Stamp Company, is not permitted . . .

We have also examined a like page from the stamp containers furnished customers in which gold bond stamps may be pasted and it contains substantially the same provision. Triple-s blue stamp books have a like provision in their stamp books in which triple-s stamps are pasted.

The purpose and intention of contract provisions similar to those above-mentioned concerning the distribution and use of trading stamps, doubtless are designed as a protection to the trading stamp company's contractual arrangements with its customers and licensees and their customers and to insure the use of its trading stamps in conformity to, and in compliance with, the contracts under which the trading stamps are supplied, distributed and redeemed. The primary question here presented is whether or not a trading stamp company, in its contracts with its customers (in most instances retailers of goods, wares and merchandise) may limit the redemption of its trading stamps to rightful holders.

The rule is stated in 87 C.J.S. 880 and 881, §7, as follows:

> Contracts restricting the use, disposal and transfer of trading stamps, making them good only for redemption purposes, or making them non-transferable on their face, are valid and lawful contracts and not contrary to public policy. Where, however, stamps have been issued without limitation on the power of the holder to transfer them, the trading stamp company may not, by a subsequent change in its contracts with its customers, limit the transferable quality of such stamps as have passed to dealers and traders in the regular way . . .

"The stamp simply represents the contract of the stamp company that, when a given number of stamps are presented, the holder thereof can select an article from the stock of the company in exchange for the stamps," (52 Am. Jur. 793, §16), except as may be otherwise provided by statute. "Redemption may be made to depend on their (the trading stamps) being presented collectively." (52 Am. Jur. 793, §16, note 1). We have also examined numerous published court reports cited in said 87 C.J.S. 880 and 881, §7, and 52 Am. Jur. 593, §16, as well as in 63 C.J. 757 and 758, §§12 and 13, and find nothing in said authorities which appears to prohibit contracts between trading stamp companies and their customers restricting the use, disposal and transfer of trading stamps so long as the right of the customer receiving them in connection with the purchase of goods, wares or merchandise to have them redeemed by the issuing trading stamp company, or its duly authorized agent is not impaired, unless there be a statute providing otherwise.

Sections 559.03-559.06, F. S., regulates the distribution, issuance and redemption of trading stamps in this state, and requires the registration of persons, firms and corporations distributing, issuing and redeeming trading stamps within the state. Trading stamps are defined

in §559.01(1), F. S., as legal devices: "which entitles the rightful holder, on its due presentation for redemption, to receive merchandise, service or cash." therefor. Section 559.03, F. S., requires that the person distributing trading stamps indicate upon the trading stamps themselves the "cash value determined by the company" and further provides that "the rightful holders (of trading stamps) may, at their option, redeem the stamps . . ." The bond of trading stamp companies is required to provide that they will "redeem the stamps issued by retailers in this state . . . when they are duly presented for redemption by the rightful holders." We find nothing in §§559.01-559.06, F. S., sufficient to change the general rule that trading stamp companies may, by contract with their subscribers and stamp distributors, and their customers, limit the redemption of stamps issued by them to those persons to which such stamps were issued, excluding stamps obtained through the operation of so-called stamp exchanges.

The above-stated question is answered in the affirmative.

066-62—June 10, 1966

ELECTORS AND ELECTIONS

DEATH OF CANDIDATE ON DATE OF SECOND PRIMARY ELECTION

To: John L. Connell, Chairman, Alachua County Canvassing Board, Gainesville

QUESTION:

What procedure should be followed in the event a candidate for nomination to elective public office in Florida dies on the day of a second primary election prior to the time the polls open?

According to your inquiry there were two candidates seeking the democratic nomination to the Alachua county school board in the recent second primary election. At 4:55 a.m. on election day one candidate died, leaving no time to alter the ballot. There are no constitutional or statutory provisions which govern although §100.112, F. S., covers such situations where they occur in connection with a general election. The question now presents itself as to whether the second candidate should be declared nominated or another election should be called.

There are no controlling Florida cases directly on point. The most analogous decision of this state's highest court appears to be found in McQuagge v. Conrad, Fla., 65 So.2d 851. In that case the incumbent tax assessor died three days before the general election. His name was the only name on the ballot, however, there were a substantial number of votes cast for two write-in candidates and in the final analysis a Mr. Gerald Conrad received the highest number of votes, the deceased candidate received the second highest number of votes and the son of the deceased candidate received the third highest number of votes.

In that case it was determined as a matter of fact that all the voters of the county had knowledge of the death of the candidate McQuagge, a fact which has not been established in this situation. In the McQuagge case the court said at p. 853:

> *Knowledge of the voters is material* and 'when votes are cast for a person known by the voters to be deceased, (such votes) they shall be treated as void and thrown away and are

not to be counted in determining the result of the election as regards *other candidates.*' (Parenthetical matter and emphasis supplied.)

In reaching its conclusion the court cited with approval the annotation and authorities found at 133 A.L.R. 319, p. 329, *et seq.* The general rule in such cases is stated as follows p. 321 of the annotation:

> The general rule-that votes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards the other candidates-has been most frequently applied in cases where the highest number of votes were cast for the deceased or disqualified person. The result of its application in such cases is to render the election nugatory, and to prevent the election of the person receiving the next highest number of votes.

It appears to be the consensus of the annotated cases and the McQuagge case, *supra*, that knowledge of the voters is material, however, the annotation goes on to explain at p. 329 that there is a conflict among the authorities in those instances where the voters are aware of the death of the candidate. See 133 A.L.R. 319, p. 329, citing Madden v. Election Comrs., 251 Mass. 95, 146 N.E. 280; State *ex rel* Wolff v. Geurkind, 111 Mont. 417, 109 P.2d 1094; Blaine v. Alameda County, 1 Cal. 2d 486, 35 P.2d 517, and Dunagen v. Jones, Tex. Civ. App., 76 S.W. 2d 219.

The authorities are further discussed at 18 Am. Jur. 353, Elections, §§263-4, wherein an explanation is given of the American rule which broadly stated, makes no distinction between votes cast in ignorance of the recipient's ineligibility and those given with full knowledge thereof as opposed to the so-called English rule which holds that voters who knowingly vote for a person that is dead or ineligible throw away their votes. When the candidate dies just prior to the election, a difficulty generally arises in determining when it may be said that the electorate generally knew of the candidate's disqualification. In this regard see 42 Am. Jur. 797, Public Officers, §138, footnote 8, and 29 C.J.S. 678, Elections, §243.

In this instance your inquiry indicates that the candidate died just prior to the opening of the polls at 4:55 a.m. on election day. However, there is no suggestion as to the amount of publicity or official notice which was given to the death of the candidate and therefore the question raised in your inquiry cannot be answered with any degree of specificity on the basis of the facts presented.

Applying the facts as best known to you it would appear from the rules set out above and especially from the comments of the Fla. Sup. Ct. in the McQuagge case indicating that "knowledge of the voters is material" that if it can be determined that the voters generally had knowledge of the death of the candidate, then votes for the deceased candidate should not be counted and the other candidate in the race would be considered elected. On the other hand, if it can be determined that the electorate was generally ignorant of the passing of the candidate then the election would be considered a nullity. Such a determination would, however, have to be made by way of an appropriate proceeding in a court of competent jurisdiction for nowhere in the State Constitution or Florida Statutes, does it appear that any administrative agency is vested with the uncontroverted authority to declare the remaining candidate nominated or nullify the results of the election.

Your question as set out above is answered accordingly.

066-63—June 23, 1966

CONTRACTS FOR SERVICES—COUNTY BOARDS OF PUBLIC INSTRUCTION

AUTHORITY TO CONTRACT FOR CHARTERED VEHICLES—BASIS FOR TERMS

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

May a county board of public instruction allow reimbursement to the owner of a privately-owned aircraft, or other vehicle, used in official business for each person traveling in said airplane or other vehicle on the basis of one common carrier fare for each person transported?

Section 230.23(10)(i), F. S., provides:

Contracts for materials, supplies, and services.—Contract for materials, supplies, and services needed for the county school system; provided, that no contract for supplying these needs shall be made with any member of the county board, with the superintendent, or with any trustee in the county, or with any business organization in which any county board member, the county superintendent, or any trustee has any financial interest whatsoever, except that any trustee may submit sealed competitive bids and be awarded a contract as provided by law for the lowest and best bid.

Section 112.061(7)(e), F. S., provides:

Transportation by chartered vehicles when traveling on official business may be authorized by the agency head when necessary or where it is to the advantage of the agency, provided the cost of such transportation does not exceed the cost of transportation by privately-owned vehicle pursuant to paragraph (d) of this subsection.

Paragraph (d) of said subsection is as follows:

The use of privately-owned vehicles for official travel in lieu of public-owned vehicles or common carrier may be authorized by the agency head if a public-owned vehicle is not available. Whenever travel is by privately-owned vehicle, the traveler shall be entitled to a mileage allowance at a fixed rate not to exceed ten cents per mile or the common carrier fare for such travel, to be determined by the agency head. Reimbursement for expenditures related to the operation, maintenance, and ownership of a vehicle shall not be allowed when privately-owned vehicles are used on public business and reimbursement is made pursuant to this paragraph, except as provided in subsection (8) of this section.

All mileage shall be shown from point of origin to point of destination and when possible shall be computed on the basis of the current state road department map. Vicinity mileage necessary for conduct of official business is allowable but must be shown as a separate item on the expense voucher.

We are of the view that the reference to "ten cents per mile or the common carrier fare" in the above-quoted paragraph relates to 10¢ per mile for the use of the vehicle itself or the common carrier

fare as charged for usual common carriers for like or similar travel. The charge made must be either on the basis of 10¢ per mile for the vehicle or the common carrier fare, it may not be both. Whether or not a private individual using his own means of transportation charging his passengers common carrier fare would be subject to classification as a common carrier is not within the purview of this opinion.

In view of the above statutory authority for a county board of public instruction to contract for chartered vehicles, it is my opinion that a contractual arrangement could be made for the owner of a properly licensed privately-owned aircraft to furnish transportation at reasonable costs for persons traveling on necessary and approved official business of the county school system within the common carrier limit authorized for each passenger.

The terms of such contract must necessarily be left to the discretion of the county board of public instruction. If in the opinion of the board the rate charged per passenger by common carriers is a reasonable criterion for determining the consideration to be paid for such transportation, it is my opinion that such charges would be reasonable.

It should be noted, however, that if transportation is furnished under this arrangement persons traveling in the aircraft, including the pilot, could not be personally reimbursed for mileage traveled at the 10¢ per mile rate authorized by law, since this transportation cost would have been paid under the charter arrangement contemplated.

Subject to the above comment, your question is answered in the affirmative.

066-64—June 23, 1966

ELECTIONS—CANDIDATES FOR OFFICE

CORRECTING OMISSION IN QUALIFICATION PAPERS SUBSEQUENT TO QUALIFICATION DEADLINE

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

> **Where a prospective candidate mails qualifying papers to the secretary of state which are received on the last day for qualifying and it appears on the face thereof that the loyalty oath was signed by the applicant but not acknowledged by a notary so as to be a sworn oath as required by §§99.021(1)(i), and 876.05, F. S., may said papers be accepted and filed nunc pro tunc when an affidavit is later received from a notary stating that the prospective candidate did sign the loyalty oath before the notary as required by law but that through inadvertence the notary seal and signature were omitted?**

It has long been the general rule in Florida relative to election cases that: "The statutes evidence no indication of an intention to except anyone from their operation, or to place the duty or responsibility for compliance therewith upon anyone *other than the prospective candidate himself.*" State *ex rel* Taylor v. Gray, 157 Fla. 229, 25 So.2d 492, at 496. (Emphasis supplied.) The court in this same case went on to say at p. 496 that the prospective candidate "was charged with the duty, for his own protection, either of determining for himself that the lesser amount would be sufficient, or of at least tendering to the clerk the amount that he, Jones, knew the statute actually provided should be

paid. Had he, Jones, exercised the slightest degree of care or prudence in the matter the mistake would have been discovered."

In Battaglia v. Adams, Fla. 164 So.2d 195, the Fla. Sup. Ct. speaking through justice Roberts quoted with approval the above language from the Taylor case, *supra*, and said at p. 199:

> This court has uniformly held that a candidate's qualification papers must be completed and filed within the time prescribed by statute, and that any errors or omissions cannot be corrected after the filing deadline has passed. (Citations omitted.)

To the same effect were the observations in the opinion of my predecessor found in AGO 064-37, p. 298 of the 1963-64 biennial report of the attorney general, wherein it is stated:

> On the basis of the authorities cited herein it would appear that once the deadline for filing has passed no further alterations or changes can be made in a candidate's qualification papers. . . .

Another illustration is found in AGO 052-106, p. 124 of the 1951-52 biennial report of the attorney general, in which my predecessor Richard Ervin, now a justice of the Sup. Ct., held: "a candidate improperly qualified and ineligible to seek office where he filed the proper fees and papers for a seat in the State House of Representatives and merely failed to designate the proper group prior to the deadline for qualifying."

Your attention is also directed to 29 C.J.S. 403-4, Elections, §138, wherein it is observed that a "nomination petition which is invalid cannot be amended after the time for filing it has passed as by correcting a defective acknowledgment, supplying an omission from the jurat of a designating petition . . ." See also footnote 62, p. 403 under nunc pro tunc filing wherein the following statement is found:

> It has been held that proceedings under election law must be taken within times limited therein, and errors in papers may not be corrected nunc pro tunc.

In summary, it would appear that the facts as set out above indicate that:

(1) There was an omission in the qualification papers of the prospective candidate;

(2) That had the candidate exercised the "care or prudence" in examining the qualification papers before mailing them as discussed in the Taylor case, *supra*, the omission could have been timely discovered and easily corrected;

(3) The courts have held that prospective candidates are for their own protection solely charged with the duty and responsibility of exercising care and prudence to determine that qualification papers are properly and timely filed; and that

(4) The qualification papers of prospective candidates must be completed and filed within the time prescribed by statutes and that errors or omissions cannot be corrected once the deadline for filing has passed.

Accordingly it does not appear that the qualification papers can be altered or the omission corrected now that the deadline for qualifying has passed and, therefore, the question as set out above must be answered in the negative.

066-65—June 24, 1966

COUNTY SCHOOL SYSTEM—SCHOOL BUILDINGS

INSURANCE—TYPES REQUIRED, TYPES AUTHORIZED

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

May §230.23(9)(d), F. S., require county school boards to "carry insurance on every school building in all school plants including contents . . . ," shall this language be interpreted to require school boards to carry all types of insurance, in addition to fire insurance, on school buildings, such as comprehensive, windstorm, public liability and property damage, and the like?

From the language of §230.23(9)(d), F. S., requiring county school boards to: "Carry insurance on every school building in all school plants including contents, boilers, and machinery . . . ," it seems clear that it was the legislative intent that such insurance not be limited to fire insurance, but that other types of insurance, such as comprehensive, windstorm and the like, usually contemplated as providing full coverage to the property to be insured, be included as well.

See also §455.06, F. S., which provides in part that a: "county board of public instruction (is) hereby authorized in their discretion, to secure and provide . . . insurance to cover liability for damages on account of bodily or personal injury, or death resulting therefrom, to any person, or to cover liability for damage to the property of any person . . ." (Parenthetical matter supplied.)

Section 235.07, F. S., 1963, which was repealed, apparently as surplusage, by the 1965 Florida legislature in its general school code reviser bill (Ch. 65-239, Laws of Florida) provided that the county board "shall keep all school buildings of every school plant insured against loss or damage by fire. . . ." Section 230.23(9)(d), F. S., is broad enough to include fire insurance but the coverage required thereunder is not limited to fire insurance. Your attention is invited to AGO 066-20, p. 256 of the 1965-66 biennial report of the attorney general, construing the same section of the Florida Statutes, wherein after inviting attention to a reference in that section to waiver of immunity against liability insurance carried by the county board, I state:

> On the basis of such reference to waiver of immunity, I am of the opinion that the county board is, by implication, authorized by law to carry public liability insurance . . .

On the basis of the foregoing your question is answered as follows:

I am of the opinion that, under provisions of §230.23(9)(d), F. S., a county school board is required to carry not only fire insurance, but such other types of property insurance (comprehensive, windstorm, etc.) as may reasonably be considered necessary to afford full protection to the buildings and contents to be insured; and that such school board is clearly authorized, but not required, to carry public liability insurance on such buildings and contents.

066-66—June 29, 1966

SERVICE OF PROCESS

SUBPOENAS—SERVICE BY CORPORATIONS UNAUTHORIZED

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

May a corporation serve legal process under the amended provisions of rule 1.34, Florida rules of civil procedure?

Rule 1.34(c), rules of civil procedure, provides in part:

> A subpoena may be served by any person authorized by law to serve process or by any other person who is not a party and who is not less than 21 years of age

With regard to the first part of the above-quoted rule, no provision is found in Ch. 47, F. S., or other applicable law relative to service of legal process which even mentions or authorizes by implication the service of legal process by corporations.

As to the latter portion of the above-quoted rule 1.34 which permits other persons not a party to the litigation who are over 21 years of age to serve process, let me point out that while corporations may be considered persons for certain purposes, see 7 Fla. Jur. 378, Corporations, §29, and 18 C.J.S. 386, Corporations, §8, there are certain implications in the language of the rule relating to the age of persons who are authorized to serve process which indicates that the rule is limited in its application to real rather than artificial persons. Thus it does not appear to have been the intent of the framers of rule 1.34 to allow service of legal process by a corporate entity. This observation takes on added significance when rule 1.34(c) is read in conjunction with rule 1.3(c) which makes reference to service of process by officers authorized by law and upon their disqualification, by those appointed by the court. Nowhere does either rule make reference to service of process by artificial persons.

In State *ex rel* Woods-Young Co. v. Tedder, 103 Fla. 1083, 138 So. 643, at 647, *cert. denied* 285 U. S. 577, 76 L. Ed. 946, 52 Sup. Ct. 458, it was concluded that corporations do not occupy the legal status of natural persons within the purview of the rules relative to service of process. While the rationale in this case has greater application to service of process upon corporations, it is not completely without converse application for once incorporated the principals no longer act as individuals and a corporate entity could encounter difficulty in filing a return (See 25 Fla. Jur. 444, Process, §66). Some difficulty is also foreseeable in establishing that the agent or employee of the corporation who actually served the process was not a minor within the prohibition of the rule.

Since there is no specific authority in law for legal process to be served by artificial persons such as a corporate entity, this office is inclined toward the position that your question as set out above should be answered in the negative.

066-67—June 29, 1966

CRIMINAL PROCEEDINGS—COSTS

COURT REPORTER—CRIMINAL COURT OF RECORD—ORANGE COUNTY—ACQUITTED NONINDIGENT DEFENDANT—CH. 65-887, LAWS OF FLORIDA

To: Warren H. Edwards, Judge, Criminal Court of Record, Orlando

QUESTION:

Where a nonindigent defendant, being represented by privately employed counsel, is acquitted by a jury verdict of criminal charges then pending against him, is the county wherein the trial court sits responsible for payment of a court reporter, official or otherwise, privately employed by the defendant or his attorney, under the provisions of §939.06, F. S.?

The basic provision of law relating to this matter is of course §9, Art. XVI, of the State Const., which provides in substance that when the defendant is discharged, the "legal costs and expenses" shall be paid by the county where the crime is committed, under such regulations as shall be prescribed by law. The provision of §939.06, F. S., is quite similar in that it states that no defendant in a criminal prosecution shall be liable for any costs or fees of the court or any ministerial office, when acquitted or discharged.

Although the State Constitution thus provides for the payment of "legal costs" by the county, it is apparent that at the time this provision was adopted court reporters were unknown to the common law. They came into being solely by reason of statutory enactments. United States v. Stirone, 222 F. Supp. 507; Commonwealth v. Kimble, Pa., 144 A.2d 598. Hence the expense of a court reporter's services is not one of the "costs" contemplated by the constitutional phrase above, and the legislature is thus free to regulate the circumstances under which such expense may become a proper cost to be borne by the county in a criminal case.

Likewise the general statute, §939.06, F. S., does not in any way specify a court reporter's services as one of the costs or fees contemplated by its language.

In Orange county, the matter is regulated with further particularity by Ch. 65-887 Laws of Florida (house bill 1804), which became effective on Oct. 1, 1965. This act repeals previous similar laws dealing with the official court reporter of the criminal court of record in your county.

The portions of Ch. 65-887 Laws of Florida, that bear on your inquiry appear to be the following:

(1) In return for an annual salary of $4,800 the official court reporter in your county shall attend court on all plea days and shall report such proceedings as the judge of said court may direct.

(2) The official court reporter must report all trials where the defendant has been found indigent by the court and without funds to provide for the services of a reporter, for which the official reporter is allowed a sum of $30 per day additional to the regular salary.

(3) When ordered to do so by the presiding judge, the official reporter shall report the opening and closing arguments of counsel and the voir dire examination, for which the reporter is allowed further specific sums in addition to the regular salary.

(4) The official court reporter is permitted further special charges in connection with preparing transcripts of record for appeal purposes.

(5) Nothing in this act is intended to preclude the defendant from obtaining and using at his trial a court reporter of his own choice and at his own expense.

A consideration of the foregoing related provisions of law affecting your question suggests the following general conclusions:

(1) Where the official court reporter reports proceedings at the direction of the court, he renders such services in return for his salary, except that he is allowed further specific compensation for reporting opening and closing arguments and voir dire examinations, which specific further allowances are in the nature of court costs and would follow the outcome of the trial.

(2) The trial of an indigent, of course, is subject to the specific provisions of the act.

(3) In the event that the trial judge does not direct the official court reporter to report the trial proper or the opening and closing arguments or the voir dire examination, a nonindigent defendant who hires the official court reporter to report the trial or the arguments or the voir dire examination would be obligated to pay the expense thereof and cannot shift this charge to the county even if acquitted.

(4) The court reporter, in addition to his salary, is permitted to charge in all cases appealed such fees as are otherwise provided by law for preparing transcripts of records on appeal, and said fees shall be paid as are other costs in criminal cases, that is, as under §939.06, F. S. Such costs of transcripts of records on appeal, of course, follow the final outcome of the case.

If the defendant is ultimately discharged in the case, the costs of the appellate transcript would be borne by the county as an item of cost, subject to the discretion of the county commissioners, as noted below. An indigent, however, would be entitled to have the county pay the cost of such transcript of record on appeal regardless of the outcome of the case, subject only to the limitation that such fees be those permitted by law to the official court reporter of the circuit court of Orange county.

In the case of a nonindigent defendant, the court reporter would be entitled to require prepayment of such cost of transcript before delivery, ultimate liability therefor awaiting the final outcome of the case, unless such transcript of record on appeal was prepared at the direction of the judge or the county solicitor.

(5) Where a defendant hires his own reporter the expense thereof will never become an obligation of the county.

These general conclusions appear to support the following specific answer to your question as submitted.

Where a nonindigent defendant in the criminal court of record in and for Orange county, employs the official court reporter to record the trial proceedings or the arguments or the voir dire examination, without the trial judge having directed the reporter to report such proceedings, the defendant is responsible for this expense even if acquitted. A transcript of all or any portion of the proceedings, if not being used for appeal purposes, would similarly be at the sole expense of such defendant.

It should be noted, further, that the trial judge is required and authorized to enter only a general judgment against the county for legal costs and expenses of the trial where such items are properly incurred. The county commissioners are then required to investigate, audit and allow the specific items claimed by the exercise of a legal but not arbitrary discretion. Only after the exact items of costs have been so determined or otherwise established by suit does the liability of the county

therefor become fixed. DeSoto County Commissioners v. Howell, 51 Fla. 160, 40 So. 192.

The conclusion reached above appears to be in general agreement with a previous opinion of this office (AGO 064-66, May 20, 1964) regarding compensation of official circuit court reporters, which is regulated by Ch. 29, F. S. One difference that appears in these related provisions of law is that in your court the trial judge alone has discretion as to whether the official court reporter shall report the trial (except as to indigents), whereas under §29.02, F. S., in the circuit court the presiding judge, the state attorney or the defendant may require such reporting.

066-68—June 29, 1966

TRADING STAMPS

REDEMPTION—CONTRACTS RESTRICTING TRANSFER OR EXCHANGE

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Is a trading stamp company legally obligated to redeem its trading stamps obtained through stamp exchanges or from individuals to whom such stamps were issued?

It was held by this office in its opinion 066-61, of June 6, 1966, that a trading stamp company doing business in this state may, by written limitations in its stamp books or contracts with its customers and by proper notice to the public, prohibit the exchange of its trading stamps for other trading stamps, or their purchase by or assignment to other persons, firms or corporations, and refuse to redeem its trading stamps so traded or exchanged. In 87 C.J.S. 880 and 881, §7, it is stated that: "contracts restricting the use, disposal and transfer of trading stamps, making them good only for redemption purposes, or making them nontransferable on their face are valid and lawful contracts and not contrary to public policy." See also the authorities cited and referred to in our said opinion 066-61, of June 6, 1966.

From these authorities it appears that trading stamp companies are legally obligated to redeem the trading stamps issued by it, except in those cases where they, by notice in their trading stamp books, contracts with their customers, and otherwise, give public notice that they will not recognize stamp transfers through stamp exchanges or otherwise, and will redeem their stamps only from the customers receiving them in connection with the purchase of merchandise or other property or properties.

066-69—July 7, 1966

MOTOR VEHICLES

CONSTRUCTION OF TERM "IN ACTUAL PHYSICAL CONTROL OF" WHEN USED IN CONNECTION WITH PROHIBITED ACTS WHILE UNDER THE INFLUENCE OF ALCOHOLIC BEVERAGES, ETC.

To: William D. Joiner, Chief of Police, Gainesville

QUESTION:

What is the construction of the term "actual physical control" of vehicles within the contemplation of §317.201, F. S.?

The pertinent part of §317.201, F. S., reads as follows:

> (1) It is unlawful and punishable as provided in subsection (2) for any person who is a habitual user of narcotic drugs or any person who is under the influence of alcoholic beverages, narcotic drugs, barbiturates or central nervous system stimulants as defined in §404.01, when affected to the extent that his normal faculties are impaired, to drive *or be in the actual physical control of any vehicle within this state.* (Emphasis supplied.)

I will first consider the law as to what constitutes "actual physical control" of a vehicle.

In State v. Webb (Ariz.), 274 P.2d 338, the Sup. Ct. of Arizona dealt with a like statutory provision. In that case, officer Brennan was responding to a call at 2:00 a.m. when he observed a pickup truck stopped in the westbound lane of a street, with the lights on and with other cars going around it. On his return from the call, about 20 minutes later, he observed the truck still in the same location and went over to investigate. The truck's bright lights were on and the motor was running. He found Webb to be in a very intoxicated condition, "passed out" or asleep, with both hands and his head resting on the steering wheel. Webb appealed from his conviction for being in the "actual physical control" of a motor vehicle while under the influence of intoxicating liquor. The Sup. Ct. of Arizona affirmed the conviction, saying in part:

> An intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist. While at the precise moment defendant was apprehended he may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that defendant had of his own choice placed himself behind the wheel thereof, and had either started the motor or permitted it to run. He therefore had the 'actual physical control' of that vehicle, even though the manner in which such control was exercised resulted in the vehicle's remaining motionless at the time of his apprehension.

In the Webb case, he contended that the statutory words "actual physical control" were not meant by the legislature to encompass such conduct as was involved in his case and that said statute was concerned with the driving of a motor vehicle and other acts and conduct of a positive nature and did not apply to his case where the vehicle was not moving and he was asleep or unconscious. One of the reasons given by the Arizona Sup. Ct. for rejecting this contention was that Arizona had a statute providing that the rule of the common law that penal statutes are to be strictly construed had no application to the Arizona code and that its provisions were to be construed according to the fair import of their terms with a view to effect its object and to promote justice. Florida has no statute abrogating the rule of the common law that penal statutes are to be strictly construed but that fact does not mean that §317.201, F. S., should receive a construction different from that given the Arizona statute in the Webb case. The Arizona court advanced another cogent and compelling reason for rejecting Webb's said contention and holding that the statute applied to his conduct even though his vehicle was not moving and he was asleep or unconscious, which reason was stated by the court as follows:

> On the other hand, the state points out there has been a most significant change wrought in our law by the enactment of the statute, supra. Formerly, our law on the matter was Sec-

> tion 66-402, A.C.A. 1939, which read: 'Any person under the influence of intoxicating liquor or narcotic drugs, or who is a habitual user of narcotic drugs, who shall drive any vehicle upon any highway within this state, shall be guilty of a misdemeanor. . . .'
>
> This statute refers only to *driving* (Emphasis by court.), and it was held that it applied only in cases where the vehicle was in motion, State v. Ponce, 59 Ariz. 158, 124 P.2d 543; cf. Gibbs v. State, 48 Ariz. 25, 58 P.2d 1037. In enacting the new law, the word 'drive' was retained, and the words 'or be in actual physical control' were added in the *disjunctive*. (Emphasis by court.) The conclusion we draw therefrom is that the legislature intended the present law to embrace fact situations not covered by the old, more particularly the legislature intended the law should apply to persons having control of a vehicle while not actually driving it or having it in motion.

This latter reason is equally applicable to §317.201, F. S. Prior to 1941, Florida had no statute making it unlawful for a person to be in the "actual physical control" of a vehicle while drunk or under the influence of intoxicating liquors to such an extent that his normal faculties were impaired. Before that time, our only statute on the subject, (§7749, C.G.L., which, with amendments, has been brought forward as §860.01, F. S.), provided in pertinent part as follows:

> 7749. (5563.) Punishment.—It shall be unlawful for any person, while in an intoxicated condition or under the influence of intoxicating liquor to such extent as to deprive him of full possession of his normal faculties, *to drive or operate* over the highways or streets or thoroughfares of Florida any automobile, truck or vehicle or motorcycle or any other vehicle propelled by gasoline, gas, vapor, electricity, steam or other power. . . . (Emphasis supplied.)

In 1941, the Florida legislature enacted Ch. 20578, with the pertinent part of §20 reading as follows:

> (a) It is unlawful and punishable as provided in subdivisions (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, when affected to the extent that his or her normal faculties are impaired, to drive or be in the *actual physical control* of any vehicle within this state. (Emphasis supplied.)

Said §20 of Ch. 20578 Laws of Florida, became §317.20, F. S. 1941, and was succeeded by our present §317.201, F. S.

Therefore, it is clear that the reasoning in the last excerpt hereinabove quoted from the Arizona court's opinion in the Webb case is equally applicable in Florida and that when the Florida legislature enacted Ch. 20578 in 1941, it meant to add to the drunk driving offense condemned by the former law a new and different offense, viz., that of being in the "actual physical control" of a vehicle when one is under the influence of intoxicating liquor to the extent that his normal faculties are impaired, even though he is not "driving" or "operating" the vehicle. If this had not been the purpose of the legislature, its action in inserting said new provision would have been utterly meaningless, since the former law already provided penalties for "driving" or "operating" a vehicle when in such a condition.

In State v. Wilgus, 31 Ohio Opinions 443, Wilgus was charged, under a statute containing language similar to that of the above-quoted part of our §317.201, F. S., with having been in "actual physical con-

trol" of a motor vehicle while under the influence of intoxicating liquor. The evidence showed that he sat alone in his automobile on the highway for a period of 2 hours, intoxicated and asleep, the motor running, his feet on the pedals and his body slouched over the steering wheel. The court held that the evidence established his guilt of the offense charged. The above-cited case of State v. Wilgus was decided by the Common Pleas Court of Logan county, Ohio. However, a footnote (p. 443) says that the decision was affirmed by the Court of Appeals but does not give a citation to the decision of the Court of Appeals.

In State v. Ruona (Mont.), 321 P.2d 615, Ruona was convicted under a statute which made it unlawful for a person under the influence of intoxicating liquor to drive or be in "actual physical control" of any vehicle. He did not challenge the sufficiency of the evidence to sustain his conviction; rather, he attacked the validity of the statute. However, in the course of its affirming opinion, the Sup. Ct. of Montana said:

> The above definition makes it apparent that movement of the vehicle is unnecessary to charge an offense under this provision of the statute. Thus one could have 'actual physical control' while merely parking or standing still so long as one was keeping the car in restraint or in position to regulate its movements. Preventing a car from moving is as much control and dominion as actually putting the car in motion on the highway. Could one exercise any more regulation over a thing, while bodily present, than prevention of movement or curbing movement. As long as one were physically or bodily able to assert dominion, in the sense of movement, then he has as much control over an object as he would if he were actually driving the vehicle.

In State v. Bailey, 15 Fla. Supp. 60, the facts were stated in the opinion as follows:

> The record reflects that the officers, while on duty at about 4:15 A.M., February 15, 1959, found the appellant slumped behind the driver's wheel of a stationary motor vehicle on the public highway approximately on the intersection of Southwest 67th Avenue and 16th Street in Dade County. The motor was running and the lights were burning. The officers testified that, based upon their experience and the usual roadside tests, the appellant was under the influence of intoxicating liquor to the extent that his normal faculties were impaired.

Upon the basis of these facts, the Metro. Ct. of Dade county convicted Bailey of driving or being in "actual physical control" of a vehicle while under the influence of intoxicating liquor, in violation of a Dade county ordinance. On appeal, a single circuit judge, sitting as an appellate court, in affirming the conviction, said in part:

> While it is true that no one actually saw the defendant's car in motion, it is clear by the chain of unexplained circumstances and one cannot escape the logical conclusion to be drawn therefrom, that the appellant was the driver and was in actual physical control of the vehicle at the time and place charged. The offense, as others, may be proved by circumstantial evidence as well as by direct evidence. It is not necessary that any one actually saw the vehicle in motion.

The opinion in State v. Griggs, 17 Fla. Supp. 2, said that a police officer found Griggs slumped behind the steering wheel of his car, legally parked, with motor running. The same circuit judge who had decided the Bailey case, *supra*, reversed Griggs' conviction in the Metro.

Ct. of Dade county, saying:

> The charge was a violation of Section 30.15 of the Code of Metropolitan Dade County, which reads as follows—
>
> DRIVING WHILE INTOXICATED.
>
> (a) It is unlawful for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, when affected to the extent that his or her normal faculties are impaired, to drive or be in the actual physical control of any vehicle *within the county.* (Emphasis supplied.)
>
> Obviously, this section does not mean what it says. It was intended to punish for the driving on the public streets or highways by the operator of a motor vehicle while under the influence of intoxicating liquors. It was clearly not intended to make it illegal merely to be in the 'actual physical control' of any vehicle while under the influence of intoxicating liquors. The party charged did nothing more than be in the control of the vehicle, unless he was driving it on a public street or operating it under conditions under which he could damage persons or property.
>
> * * * * *
>
> Therefore, the statute must be construed as denouncing *driving* or *operating* (emphasis by court) a motor vehicle on the highways or other public places while under the influence of intoxicating liquor or narcotic drugs.

Whatever might be thought of the circuit judge's logic in the Griggs case with reference to the construction of a county ordinance, his reasoning cannot be applied to §317.201, F. S., which does not contemplate that a person must drive or operate a vehicle on a highway in order to be in the "actual physical control" thereof.

Section 317.201, F. S., makes it unlawful for one who is under the influence of intoxicating liquor to the extent that his normal faculties are impaired to be in the actual physical control of any vehicle "WITHIN THIS STATE." This means on or off a highway and does not contemplate that the vehicle must be operated. Section 317.041(1), F. S., says:

> The provisions of this chapter relating to the operation of vehicles refer to the operation of vehicles upon the state-maintained highway system and county-maintained highway system throughout this state including state-maintained municipal connecting link roads as defined in §335.05(1); *except that the provisions of §§317.071-317.211 shall apply upon highways and elsewhere throughout the state.* (Emphasis supplied.)

Said §317.041(1), F. S., further shows that the provisions of §317.201, F. S., apply throughout the state, on public highways and elsewhere. So, I do not think that it is necessary for an automobile to be on a highway or for it to be operated, in order for a person to be in the "actual physical control" of it within the contemplation of §317.201, F. S.

In State v. Shaw, 17 Fla. Supp. 146, Shaw was convicted by the Metro. Ct. of Dade county for violating a county ordinance which made it unlawful for a person to drive or be in actual physical control of a motor vehicle while under the influence of intoxicating liquor to the extent that his normal faculties were impaired. There, the arresting officer found Shaw slumped behind the wheel of an automobile parked in a parking lot. As the officer approached the vehicle, he observed Shaw attempting to start it by turning the car key which activated the ignition switch. The motor turned over a couple of times but the engine did not start. In affirming the conviction, the circuit judge said:

> It is the opinion of this court that the appellant, in the driver's seat and in a position to control the movements of the vehicle exercised 'actual physical control' over his vehicle when he turned the key in the ignition switch and attempted to set in motion the motive power of the vehicle. State v. Storrs (1933), 105 Vt. 180, 163 Atl. 560; State v. Swift (1939), 125 Conn. 399, 6 Atl.2d 359.

The opinion in the Shaw case does not contain any discussion of the fact that the vehicle was in a parking lot rather than on a highway.

In State v. Goodwin, 24 Fla. Supp. 9, Goodwin was convicted for being in the "actual physical control" of a motor vehicle while under the influence of intoxicating liquor in violation of a county ordinance. The testimony was as follows:

> The police officer testified that he observed a 1960 Ford off the roadway and the appellant was seated behind the wheel of the car. There was a slight bit of damage to the front end of her car, the vehicle appeared to have run off the road into a gully. The car lights were on and the engine was running. The appellant was seated behind the steering wheel alone in her car. She was in a state of extreme intoxication. . . .

On appeal, Goodwin questioned the sufficiency of the evidence to sustain the conviction. Still another circuit judge affirmed the conviction, holding that there was ample substantial evidence to sustain it.

We now proceed to consider whether the persons involved in the factual situations presented by your letter were in the "actual physical control" of motor vehicles within the contemplation of §317.201, F. S.

In the first situation the facts are as follows:

> "A" is passed out or sitting under the steering wheel in an intoxicated condition, the motor running, the vehicle being in the roadway.

For the purposes of the comments which follow, I will consider this statement of facts as meaning that "A" was sitting under the steering wheel regardless of whether he was merely intoxicated or had "passed out."

If the vehicle was in such condition that it could have been operated, and if "A" was not so intoxicated as to be incapable of operating it in any manner, I think that he was in the "actual physical control" thereof.

If "A" was so intoxicated that he had "passed out," I do not think that at that time he was any more in the "actual physical control" of the vehicle than if he had been completely paralyzed. Nevertheless, I think that the reasoning of the Arizona court in our first quotation from its opinion in the Webb case, *supra*, is applicable to such a situation and that, particularly in the absence of explanatory evidence, a legitimate inference, strong enough to support a conviction, can be drawn that, prior to "passing out," "A" had of his own choice placed himself behind the wheel and either started the motor or permitted it to run and that, if the vehicle was in such condition that it could have been operated, he had the "actual physical control" of it before he "passed out," even though the manner in which such control was exercised resulted in the vehicle remaining motionless.

In the second situation the facts are as follows:

> "B" is sitting under the steering wheel in an intoxicated condition or passed out, the motor not running but the vehicle being in a lane of traffic.

If "B" was not so intoxicated as to be incapable of operating the vehicle in any manner, and if it was in such condition that it could have been operated, and if the key was in the ignition lock or in "B's" pos-

session or immediate control, I think that he had the vehicle in his "actual physical control."

If he was so intoxicated that he had "passed out," and if the vehicle was in such condition that it could have been operated, and if the key was in the ignition lock or in "B's" possession or immediate control, I think that, in the absence of explanatory evidence, a legitimate inference, strong enough to support a conviction, can be drawn that he was in "actual physical control" of the car before he "passed out."

In the third situation the facts are as follows:

> "C" is parked at the curb, the motor running, he being in an intoxicated condition or passed out. What if the motor is not running?

Although this statement of fact does not say that "C" was under the steering wheel, I shall assume for the purposes of the following comments that he was under the steering wheel.

I consider it immaterial that "C's" vehicle was parked at the curb instead of on the highway since, as pointed out above, §317.201, F. S., applies on highways and elsewhere throughout the state.

Therefore, if "C's" motor was running, the foregoing comments regarding situation 1 apply to him; and if his motor was not running, the foregoing comments with respect to situation 2 apply to him.

The facts in the fourth and fifth situations are as follows:

> "D" is parked off the highway or roadway, sitting under the steering wheel, in an intoxicated condition, the motor running.
>
> "E" is parked in a public parking lot, such as a supermarket, the motor running, he sitting under the steering wheel in an intoxicated condition.

Since it matters not that the vehicles involved in these situations were not parked on a highway, the foregoing comments as to situation 1 are applicable to situations 4 and 5.

066-70—July 12, 1966

TAXATION

APPLICABILITY OF MANDATORY ROLL BACK PROVISIONS OF §193.03, F. S., TO MILLAGE ESTABLISHED AT SCHOOL DISTRICT MILLAGE ELECTION

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

> **1. Does §193.032, F. S., exempt in the fiscal year 1966-1967 the district school millage authorized by the electors from the roll back provisions contained in §193.03, F. S.?**
>
> **2. Subsequent to Jan. 1, 1964, a district school millage was rolled back, pursuant to §193.03, F. S., and in a following school district millage election, the electors authorized a millage which exceeded the existing tax levy millage in the district, may the board of public instruction exercise its authority, under §236.33, F. S., to levy a millage in the said district not to exceed the most recent millage authorized by the electors?**
>
> **3. Where there is no existing general level of increased valuation in a district subsequent to Jan. 1, 1964, does the roll back provision of §193.03, F. S., apply?**

As to question 1, §193.03, F. S., 1965, was enacted as §3 of Ch. 65-258, Laws of Florida, which reads as follows:

> Section 3. Nothing contained herein shall require the reduction of millage authorized to be levied pursuant to the provisions of section 10, article XII of the constitution of Florida.

I am of the opinion that the specific wording of the aforesaid §3 requires an affirmative answer to question 1.

As to question 2, in view of my answer to question 1 that the mandatory roll back provisions of §193.03, F. S., do not apply to millage authorized to be levied pursuant to the provisions of §10, Art. XII, State Const., the board of public instruction may exercise its authority under the provisions of §236.33, F. S., to levy a millage in said district not to exceed the most recent millage authorized by the electors.

The answer to question 2, therefore, is also in the affirmative.

Question 3 was previously answered by this office in its opinion 064-124, dated Sept. 2, 1964, to Hon. Ray E. Green, comptroller, wherein it was held:

> . . . §193.03, F. S., relates in its entirety to those cases where there has been a general increase in the ratio of assessed value of the taxable real and tangible personal property of the county, and not to those cases where there has been no such increase of valuation.

We adhere to that opinion and answer question 3 in the negative.

066-71—July 12, 1966

TAXATION

CONSTRUCTION OF §193.03, F. S.—MUNICIPAL TAXES WHEN ASSESSED ON COUNTY TAX ROLLS

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

> **May a municipal corporation, which assessed its municipal taxes on its own tax roll for a previous year, but will assess its taxes for the current year upon the county tax roll, which may result in a general increased valuation of such properties, are such valuations subject to the roll back provisions of §193.03, F. S., 1965?**

The municipal ad valorem taxes for the city of Miami, were assessed on a municipal tax roll, separate and apart from the county tax roll, for the tax year of 1965, but are being assessed on the Dade county tax roll for the tax year of 1966 by action of the governing authority for Dade county, under and pursuant to §11, Art. VIII, of the State Const., and the home rule charter of metropolitan Dade county, adopted and established in accordance with the said §11, Art. VIII, of the State Const. The effect of these constitutional, statutory and home rule charter provisions has been a consolidation of the county and municipal tax provisions, duties and obligations, including those imposed on the county and municipal authorities, differing little, if any, from like consolidations accomplished through the adoption of §§12-21 of Art. VIII, of the State Const., in Hillsborough, St. Lucie, Volusia, Broward and Pinellas counties, and is authorized under §22, Art. VIII, of the said State Const.

The consolidation of the duties of assessing county, district and municipal taxes in a single assessing authority, as well as in a single

collecting authority, has existed in Florida since Jan. 1, 1946, the effective date of §§12 and 13, Art. VIII, of the State Const., and is not, therefore, a new proceeding. This office, by its opinion 063-137, of Nov. 13, 1963, recognized the right of metropolitan Dade county, to consolidate county and municipal tax assessments and collections. It is our understanding that prior to the 1966 ad valorem tax year, including the tax year of 1965, the city of Miami, and Dade county, imposed their ad valorem taxes against real property located within the municipal boundaries of the city of Miami, on separate and distinct tax rolls, one, the city tax roll, and the other, the county tax roll, so that for the tax year of 1965 city of Miami ad valorem taxes on real and tangible personal property were assessed on a municipal tax roll, separate and apart from the assessment of the same properties for county and district taxes, which were assessed on the county tax roll.

These observations bring us to the construction of the following portion of §193.03, F. S., 1965, which was derived from §1, Ch. 65-258, which provides, insofar as here material, that:

> (1) After the assessment rolls have been prepared on the basis required by law, the board of county commissioners and the board of public instruction and all other governing boards or governing authorities of all other taxing districts, within the counties, *including municipalities, whose taxes are assessed on the tax roll prepared by the county* assessor, shall reduce the millage to be levied by each such governing authority from what it was in the preceding year proportionate to the increase of the general level of assessed value over the preceding year. . . . (Emphasis supplied.)

This language appears to have been taken from the first part of §193.03, F. S., 1963, which was derived from §8, Ch. 63-250. Much of this language appears to have been derived from §54, Ch. 20722, 1941, as amended by §24, Ch. 22079, 1943, which section made no reference to municipalities, as did the said 1963 and 1965 enactments. The advent of the above-mentioned §§12-22, Art. VIII, of the State Const., providing for the assessment of municipal taxes on the county tax roll may have dictated the inclusion of municipalities in the 1963 and 1965 enactments. This poses the question of whether the above-quoted portion of §193.03, F. S., 1965, should be read as extending only to municipalities whose taxes are assessed on the county tax rolls under and pursuant to said §§12-22, Art. VIII, of the State Const., or should it be extended to taxes imposed on municipal tax rolls as well as municipal taxes imposed on county tax rolls.

Said §193.03, F. S., is made applicable to "boards of county commissioners and the board of public instruction and all other governing boards or other governing authorities of all taxing districts, within counties including municipalities, whose taxes are assessed on the tax roll prepared by the county assessor . . ." This language clearly extends to municipalities brought within the operation of said §§12-22, Art. VIII, of the State Const. No reference is made in said §193.03, F. S., 1963 or the 1965 statutes to municipal taxes imposed on municipal tax rolls as distinguished from taxes assessed on the county tax roll. The above-quoted language clearly extended to municipal taxes assessed on the county tax rolls, but leaves in doubt its application to municipal taxes assessed on a municipal tax roll.

The requirement in the latter part of said §193.03, F. S., is that: "The tax assessor shall maintain a separate list of all properties and improvements which were added to the tax rolls each year and a separate list of properties and improvements which are withdrawn from the

rolls." Where municipal taxes are imposed on a municipal tax roll, separate and apart from the county tax roll, it becomes difficult for the county tax assessor to ascertain these requirements when he has no municipal tax roll in his office.

Some doubt arises in our mind as to the sufficiency of the title to Ch. 65-258, from which current §193.03, F. S., was derived; however, §193.03, F. S., as amended by §8, Ch. 63-250, as compiled into the Florida Statutes, 1963, became codified by the adoption of Ch. 65-1, and became a part of the Florida Statutes, 1965, so that should the title to Ch. 65-258 be held to be invalid, said §193.03, as amended by §8, Ch. 63-250, would be applicable until the adoption of a new statute at the 1967 regular session of the Florida legislature.

Ordinarily, revenue statutes are construed strictly in that they "operate to impose burdens on the public, or to restrict them in the enjoyment of their property and the pursuit of their occupations, and will be construed strictly. The provisions of such statutes are not to be extended by construction or implication beyond the clear import of the language used, nor will they be enlarged so as to embrace matters or persons not specifically named or pointed out . . ." (82 C.J.S. 952-956, §396.) Ordinarily, words used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended. (82 C.J.S. 639-648, §329.) The language in the first part of §193.03, F. S., clearly extends to counties, taxing districts and municipalities whose taxes are assessed on the tax roll prepared by the county assessor, but makes no mention of tax rolls prepared by the municipality. Where municipal taxes are assessed on the county tax roll, as required by the constitution or statutes in some counties, it is convenient for a county tax assessor to determine the previous year's tax valuations from the rolls in his office; however, especially in counties having numerous municipalities within its boundaries, the problem of the county assessor of taxes making a check of such municipal tax rolls to ascertain valuations of the properties within such municipality may present a problem. There is no specific requirement in the statute that this information be furnished by the cities to the county tax assessor. Said §193.03(5), provides that: "All references to millage and reduction of millage contained in this section shall apply to all millages levied on the basis of the county assessors' rolls whether such millage is levied pursuant to local, special or general law." This provision appeared as §8, subsection (5) of Ch. 63-250, above-mentioned, and also appeared in §54, Ch. 20722, 1941, and in the amendment of said section by §24, Ch. 22079, 1943.

Section 22, Art. VIII, of the State Const., provides that: "The legislature may, by general, special or local act, provide for the assessment of the taxes of any municipality by the County Tax Assessor of the county wherein such municipality is located and the collection thereof by the County Tax Collector of such county; . . ." when such acts are approved by the electors of the municipality. We are not advised as to what municipalities, if any, have been brought within the purview of said section, whose taxes are assessed and collected by the county tax assessor and county tax collector.

Section 193.03, F. S., is made applicable to such municipalities within a county whose taxes are assessed on the tax roll prepared by the county assessor, in which case the county assessor will have full information concerning tax valuations, both county and municipal, within his office. However, this section does not appear to be applicable when municipal taxes are assessed on the county tax roll for the previous year as well as for the current year, and not where such municipal taxes

are assessed only on a county roll for a current year, but on the municipal tax roll for the previous year.

Your question, within the specific limitations in which cast, is answered in the negative. Factual circumstances and applications are material in determining the application of §193.03, F. S., as amended by §1, Ch. 65-258, and in construing the same. It is the obligation of the attorney general, as well as the courts, to construe and determine the intent and meaning of the statutes and the intention of the legislature when such statute was enacted. This we have done, using the ordinary rules of statutory construction. The courts, as a general rule, cannot inquire into the motive, policy, wisdom or expediency of a statute enacted by the legislature (16 C.J.S. 775 *et seq.*, §154; 16 Am. Jur. 2d 371-378, §§163-166). Courts should not invalidate statutes and law "because they may seem to the court to be detrimental to the best interests of the state." The remedy for correcting laws that are detrimental to the interests of the state is legislation repealing, amending or correcting such laws. Although a court may determine the power of the legislature to enact a law, the expediency and wisdom of such a law is a legislative and not a judicial matter. (16 Am. Jur. 373, §163, note 20).

It is our obligation to construe and determine the application of said §193.03, F. S., however, the appropriation of funds derived from taxation by the city of Miami, as well as the amount thereof, and the use thereof, is an obligation of the governing body of the said city, and not of this office. The governing body of the city of Miami, in the preparation of the municipal budget of necessity, operates under the charter and applicable ordinances of Miami, and it is presumed that they will administer their duties and obligations for the benefit of the taxpayers.

066-72—July 15, 1966

TEACHING PERSONNEL—PUBLIC SCHOOLS

DUVAL COUNTY—TENURE, CONTRACTS OF EMPLOYMENT—CH. 21197, LAWS OF FLORIDA, SPECIAL ACTS, 1941

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

> **Do the provisions of Ch. 21197, Laws of Florida, Special Acts, 1941 (House Bill No. 1715), an act providing for tenure employment of teachers in the public schools of Duval county, preclude the issuance of a contract of employment for a fifth probationary year, provided that any teacher so involved shall agree to such contract in writing?**

The last paragraph of §1 of the special act above referred to provides that the probationary period of employment shall be deemed to include a year's additional employment after the initial three years when required by the board of public instruction of the county and agreed to in writing by the teacher.

Section 3 of the act provides that after a teacher has completed the probationary period of employment and shall thereafter be employed, such teacher acquires tenure status.

The act does not provide for the extension of the probationary period beyond a maximum of 4 years. Although in instances such as the

one outlined in your letter a fifth probationary year consented to by the teacher might be desirable for all concerned, such is not contemplated by the act.

We are aware that §231.351, F. S., provides in certain circumstances for annual contracts for teachers who are otherwise entitled to receive a continuing contract. Such provision, however, does not appear in Ch. 21197, Special Acts of 1941.

The Sup. Ct. of Fla., in the case of Harley v. Board of Instruction of Duval County, Florida, held that the terms of Ch. 21197, *supra*, "control over the general statutes covering the county school system (Ch. 230, F. S., F.S.A.) . . ." In that case the court cited City of St. Petersburg v. Carter, Fla., 39 So.2d 804, 806, as follows:

> We have consistently held that a special grant of power or a special act of the legislature takes precedence over a general grant or law on the same subject. Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211, and City of Apalachicola v. State, 93 Fla. 921, 112 So. 618.

Since Ch. 21197, Special Acts of 1941, does not provide for an extension of the probationary period beyond the maximum of 4 years, and since this act is controlling in Duval county, your question must be answered in the affirmative.

066-73—July 20, 1966

OCCUPATIONAL LICENSES

MUNICIPAL—CONTRACTORS FOR STATE BUILDINGS NOT REQUIRED TO ACQUIRE

To: W. M. Corley, Jr., Assistant Business Manager, Board of Regents, Tallahassee

QUESTION:

> **Can the city of Gainesville, require general contractors or subcontractors, engaged exclusively on construction projects for the board of regents within the corporate limits of that city, to acquire occupational licenses?**

My predecessors in office and I have continuously held that: "a municipality may not impose a tax or license fee upon the state unless the statute clearly authorizes it" (AGO 046-426); and that: "generally speaking, the state is not subject to legislative enactments of a municipal corporation and the property of the state and its agencies is free from municipal direction. A municipality of the State of Florida, unless expressly authorized by its charter to do so, is without authority to require municipal building permits of contractors engaged in the construction of state buildings within the limits of the municipality" (AGO 058-67, cited in AGO 065-81).

I see no reason to recede from the conclusions reached in the opinions cited above and in other opinions issued by me and by predecessors in office on similar or related questions.

The board of regents is, of course, an agency of the state. There appears to be no provision in the present charter of the city of Gainesville authorizing that city to require general or subcontractors engaged on construction contracts with the board of regents to acquire city licenses.

Section 239.65, F. S., 1965, provides as follows:

> (1) The institutions under the board of regents are authorized to contract for supplies, utility services, and building

construction without regulation or restriction by municipal or county charter or ordinance. . . .

(2) Any municipal or county charter, ordinance, or regulation that serves to restrict or prohibit the intent of subsection (1) shall be inoperative.

I am of the opinion that it was the intent of the legislature, in enacting the above-quoted law, specifically to prevent such an attempt by a municipality to subject an agency of the state to its municipal ordinances.

Your question is accordingly answered in the negative.

066-74—July 26, 1966

REGULATION OF PROFESSIONS AND VOCATIONS

CHIROPRACTORS—ADVERTISING—INTERPRETATION OF §§460.11(2)(c) AND 460.13(3)(g)1. AND 2., F. S.

To: Dr. J. Paul Grant, Secretary-Treasurer, Board of Chiropractic Examiners, Tallahassee

QUESTION:

Are letters written by chiropractic physicians to their patients, former patients, their families and friends offering free chiropractic services or offering such services at a reduced rate considered "advertising" or an "advertisement" within the prohibition contained in §§460.11(2)(c) and 460.13(3)(g)1. and 2., F. S.?

Enclosed with your request is a file containing the types of letters to which you refer. Examples of these letters are hereinafter set forth:

1. A letter addressed 'dear friends' announcing the offering of free x-ray services to former patients, their families and friends and requesting that the 'friend,' 'tell someone about the free x-ray services;'

2. A letter styled 'notice to patients' offering a special heart examination 'for the very low fee of $5.00;'

3. A letter addressed 'dear patient' requesting the patient to advise his family and friends of free x-rays.

Section 460.11, F. S., defines chiropractic and sets forth certain principles relative to the practice of chiropractic. Subsection (2)(c) of said section specifically provides:

> No chiropractic physician shall in any *advertisement in any publication or media in the state advertise the prices for which his services are available.* The advertisement of free services or consultation shall be deemed to be in violation of this section. (Emphasis supplied.)

Section 460.13, F. S., sets forth the grounds for the suspension or revocation of the certificate to practice chiropractic. In particular, subsection (3)(g)1. and 2., provides as follows:

> (3) The board, pursuant to the procedure prescribed in this act, shall have the authority to discipline any applicant for license, or the holder of a license to practice as a chiropractic physician, who is found guilty by the board of one or more of the following:
>
> * * * * *
>
> (g) That he, in his capacity as a chiropractic physician has:

1. Caused the publication, broadcast, circulation or public display of any advertisement in violation of any of the rules and regulations of the board governing the size, shape, content, material, construction or method of distribution of any form of advertising; or

2. *Advertised the price for which his services are available, or advertised free service or consultation; or . . .* (Emphasis supplied.)

In addition to the foregoing provisions pertaining to advertisement, the state board of chiropractic examiners adopted rule 100-2.01 in effect limiting advertising by chiropractors to the publication of a professional card only, not exceeding 1 column by 2 inches. Among other limitations contained in such regulation is the prohibition against using handbills, boxholders or occupant addressed advertising material.

It is apparent that the foregoing statutes and regulations are intended to prohibit certain types of advertising by members of the chiropractic profession. In determining whether announcements, and in particular the foregoing letters, are "advertisements" within the aforementioned statutes, each situation must be viewed individually and the totality of the circumstances must be considered. In this regard, the courts when construing statutes, will consider the history of the enactment, the intention of the legislature, the subject to be regulated, and the objects to be obtained even though the intent may vary from the strict letter of the statute (Singleton v. Larson, 46 So.2d 186).

In construing statutes, the words used should be given the meaning accorded them in common usage and should be construed in a plain and ordinary sense (Golden v. Kirk, 47 So.2d 567; Gasson v. Gay, 49 So.2d 525).

The words "advertise," "advertisement" and "advertising" are defined in the Merriam-Webster new international Dictionary, 2nd Ed., as:

Advertise—To give public notice of, to announce publicly esp. by a printed notice; as to advertise a sale; hence, to call public attention to, esp. by emphasizing desirable qualities, in order to arouse a desire to purchase, invest, patronize or the like.

Advertisement—A public notice, esp. in some public print, as a newspaper, periodical, book, poster, or handbill; anything that advertises.

Advertising—Any form of public announcement intended to aid directly or indirectly in the sale of a commodity, etc., in the promulgation of a doctrine or idea, in securing attendance, as at a meeting or the like.

The word "media" is plural for the word "medium" which is also defined in Merriam-Webster, *supra*, as "that through or by which anything is accomplished; conveyed, or carried on; an intermediate means or channel; instrumentality; as, an advertising medium."

With respect to the application of the foregoing words as used in §§460.11(2)(c) and 460.13(3)(g)1. and 2., F. S., the letters referred to in your file would appear to fall within the above-described definitions. The letters appear to take the form of a public announcement intended to aid directly or indirectly in the promulgation of an idea, to wit: an invitation to accept free chiropractic services or services at a reduced rate. The letters call public attention to the chiropractor by emphasizing the desirable qualities of chiropractic services in order to arouse a desire to either patronize the particular chiropractor or secure chiropractic services.

It appears that the above-described letters are in the nature of

"advertisements" and "advertising" within prohibition of the aforementioned statutes, therefore it becomes necessary to ascertain whether the statements contained in such advertisements do in fact "state prices" or offer "free services." The letters contain references to a "$5.00 fee," "reduced fees," "x-rays without charge" and "free x-ray services" which would seem to fall within the prohibited activities set forth in §§460.11-(2)(c) and 460.13(3)(g)1., and 2., F. S. It should be noted, however, that this determination involves questions which must be ultimately resolved by your board.

While your inquiry relates to the advertising provisions of Ch. 460, F. S., it should be noted that the statements contained in the subject letters may fall within the prohibition of §460.13(3)(d) which prohibits the solicitation of patients through an agent.

The foregoing comments are intended to answer the question of whether such letters constitute advertisements within the prohibited sections; however, these comments should not be construed as constituting a finding of the guilt or innocence of the parties affected as this can only be determined through an administrative hearing complying with the applicable constitutional statutory provisions.

In summary, based upon the consideration of the totality of the situation coupled with the apparent legislative intention reflected in the statutes, it is my opinion that the letters described above appear to be "advertisements" and constitute "advertising" within the language contained in §§460.11(2)(c) and 460.13(3)(g)1. and 2., F. S.

066-75—July 26, 1966

OCCUPATIONAL LICENSE TAXES

APPLICATION OF §205.63, F. S., TO NEWSPAPER VENDING MACHINES

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Are newspaper vending machines within the purview and intention of §205.63, F. S., and subject to a license and license tax thereunder?

Said §205.63, F. S., provides, insofar as here material, that: "Every person, except merchandise vending machine operators, who operates for profit any machine, contrivance or device which is set in motion or made or permitted to function by the insertion of a coin, or slug, shall pay a license tax of five dollars for each machine, contrivance or device . . ." This section contains certain exceptions and exemptions not involved in this question. This section was derived from §19, Ch. 18011, 1937, as amended by §19, Ch. 20956, 1941, and was amended by §2, Ch. 63-421. None of these statutes appear to affect the question as above posed. Certain vending machines were subject to license taxes under subsection (e) of §19, Ch. 14491, 1929, including those vending merchandise and those showing the weight of persons or objects and those producing or reproducing music, musical sounds or noises, as well as those reproducing pictures, prints or writings. Vending machines were subject to license taxes under §10, Ch. 6421, 1913, when operated for profit. It therefore appears that vending machines in Florida, at least as to certain types, have been subject to license taxes since Ch. 6421, Laws of Florida, 1913.

It has been held that the legislature may make a distinction in

imposing license or occupational taxes based on the manner in which an article is sold, as through a mechanical device or a vending machine (53 C.J.S. 845 and 846, §22; see also 53 C.J.S. 597 and 598, §30). In State v. Fairbanks, 65 S.D. 272, 273 N.W. 188, text 189, 111 A.L.R. 759, the court held a player phonograph machine operated by placing nickels in a slot, to be a vending machine. In American Meter Co. v. McCaughn, D.C. Pa., 1 Fed. Supp. 753, text 754, a machine which vends merchandise, upon the deposit of a coin or metal chap, was held to be a vending machine. The word "vend" is usually used in the sense of selling or making a trade; hawking and peddling merchandise (91 C.J.S. 808). See also 44 Words and Phrases, Perm. Ed., 169 and 170.

The constitutional guarantee of freedom of the press is subject to the proper exercise of the government's power of taxation, so that the imposition of a uniform and nondiscriminatory tax is not invalid as applied to persons or organizations engaged in the dissemination of ideas through the publication or distribution of writings. "The guarantee of freedom of the press does not forbid the taxation of money or property employed in the publishing business, or the imposition of reasonable licenses and license fees on trades or occupations concerned with the dissemination of literature and ideas." (16 C.J.S. 1132, §213(13). See also Tampa Times Co. v. City of Tampa, Fla., 29 So.2d 368, where the Sup. Ct. of Fla. upheld a license tax upon retail sellers of newspapers, magazines and periodicals. It appears that persons engaged in the distribution of newspapers, magazines and periodicals in this state may be subjected to license taxes so long as such taxes are reasonable in amount. The freedom of the press does not extend to freedom from licenses and license taxes. We come now to the construction of §205.63, F. S., and its application to the sale and distribution of newspapers, magazines and periodicals.

Said section provides, insofar as here material, that "every person except merchandise vending machine operators, who operate for profit any machine, contrivance or device which is *set in motion* or *made* or *permitted to function* by the insertion of a coin, or slug, shall pay a license tax of five dollars for each machine, contrivance or device . . ." (Emphasis supplied.) This section contains certain limitations and extensions, not here materially involved, which should be taken into consideration when applicable. To bring a machine, contrivance or device within the purview of said §205.63, F. S., it must be either set in motion, made to function, or permitted to function by the insertion of a coin or slug. The phrases set in motion and permitted to function leave the impression of an automatic or self-functioning machine, contrivance or device. These terms are rather broad in their scope and extent, and seem to extend to: 1. Automatic machines, contrivances and devices; 2. As well as those which, through the insertion of a coin or slug, permit an individual to cause the machine, contrivance or device to be operated and function; 3. As well as those which unlock the machine, contrivance or device so as to permit self-service.

Newspaper vending machines, whether automatic, semiautomatic or self-service, which are set in motion, made to function or permitted to function, by the insertion of a coin, or slug, are within the purview and intention of §205.63, F. S., so that the above-posed question is answered in the affirmative.

066-76—July 26, 1966

RETIREMENT

JUDICIAL SYSTEM—CONSTRUCTION OF §123.29, F. S., SOCIAL SECURITY

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

When computing retirement benefits for members of division B of the judicial retirement system under §123.29, F. S., should the retirement benefits be reduced by the amount of social security benefits when a combination of the two exceeds the retiree's average final compensation?

It appears from your file in this case that the retiree in question has served as a circuit judge of this state for a total of 21 years, and has other applicable creditable services totaling 28 years, 10 months and 22 days, making a total creditable service for retirement purposes of 49 years, 10 months, and 22 days. We find in your file an audit sheet showing that the said circuit judge presently has an average final compensation of $15,600. It appears from your file that the circuit judge in question was born Nov. 5, 1880, so that he has passed his 84th birthday, bringing him within the provision of §123.29, F. S., that his ". . . retirement compensation as may otherwise be payable subsequent to the member's sixty-fifth birthday shall not exceed that amount (retirement pay) which, when added to his estimated annual primary insurance amount as provided under social security coverage at age sixty-five, as determined by the administrator, equals his average final compensation. Should this limitation with respect to retirement compensation payable after the member's sixty-fifth birthday be applicable, the amount of retirement compensation shall be adjusted accordingly." (Parenthetical matter supplied.) The said statute contains a like provision as to members who retire prior to their sixty-fifth birthday.

There is a provision in §122.28(3), F. S., relating to the state and county officers and employees retirement system of this state, that: "the amount of such retirement compensation shall not exceed that amount which when added to the member's estimated annual primary insurance amount under social security coverage equals eighty per cent of his average final compensation." This provision in the state and county officers and employees retirement system is very similar to that contained in the said judicial retirement system, each of which may be taken note of when construing the other law. These provisions in §§123.29 and 122.28, F. S., were designed to limit the amount of combined retirement compensation and social security insurance that a member may receive; however, said sections should be construed as being limited to social security coverage obtained in connection with the said retirement systems and not as extending to social security coverage unconnected with such retirement systems.

When computing retirement benefits for members of division B of the judicial retirement system under §123.29, F. S., the combined retirement and social security benefits should not exceed the retiree's average final compensation and in case such combined retirement and social security coverage exceeds the said average final compensation, retirement pay should be reduced by a sum equal to the excess over average final compensation, so that the two will not exceed the said average final compensation.

066-77—July 28, 1966

EDUCATION—COUNTY SCHOOL SYSTEM

JUNIOR COLLEGE—LUNCH PROGRAM—CONTRACTS WITH FOOD SERVICE COMPANY NOT PROHIBITED

To: Floyd T. Christian, State Superintendent of Public Instruction, Tallahassee

QUESTION:

May a junior college, established under the provisions of §230.0101, F. S., comprising a part of the county school system, subject to state board of education regulation 130-7.43(1), require the county board and county superintendent to prohibit the operation of any public school lunch program of the county under a fee concession with a food service management company.

State board of education regulation 130-7.43(1) establishes the responsibility of the county board and the county superintendent to do two things:

1. Control, administer, supervise and operate all of the school food service programs of the county; and
2. Prohibit the operation of any public school lunch program of the county under a fee concession or contract agreement with a food service management company or under a similar arrangement.

Under the first requirement it is the duty of the county board and the county superintendent to control, administer, supervise and operate the food service program of the junior college within the county, since, pursuant to the provisions of §228.14, F. S., junior colleges are a part of the public school system of Florida.

In AGO 062-147, dated Nov. 6, 1962, attorney general Richard W. Ervin held that there was no prohibition, either statutory or by state board of education regulation, which would prevent a county school board from contracting for food or other services necessary to a junior college campus if, in the discretion of the board, such services could be provided more economically and efficiently on a contractual basis.

The question now becomes whether the second portion of the regulation outlined above prohibits the contracting for food services in junior colleges. It will be noted that such operation is prohibited for any public school lunch program. Reference to the public school lunch program is made in several sections of the Florida Statutes and although no definition of the program is contained therein it is obvious that it contemplates that program within the state which receives aid under the federal school lunch program as outlined in §§1751-1760, title 42, U.S.C. Under subsection (7) of said §1760 "school" is defined as any public or nonprofit private school of high school grade or under.

I am, therefore, of the opinion that food service within a junior college is not a part of the public school lunch program of the county. Thus, your question is answered in the negative.

066-78—July 29, 1966

TAXATION

INTANGIBLE PERSONAL PROPERTY—CLASS "A"—FURNISHING LIST OF SHAREHOLDERS TO TAXING OFFICIALS UNDER CH. 199, F. S.

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. Are individuals, persons, firms, corporations, etc., who pay intangible taxes on Class "A" intangible personal property as agents for other individuals, persons, firms, corporations, etc., required under Ch. 199, F. S., to provide a list of shareholder accounts to the tax assessor or comptroller on those accounts for which no tax is paid by the agent because of the minimum requirements contained in §199.071, F. S.?

2. Are individuals, persons, firms, corporations, etc., who pay no intangible taxes on Class "A" intangible personal property as agents for other persons, individuals, firms, corporations, etc., required under Ch. 199, F. S., to provide a list of shareholder accounts to the tax assessor or comptroller on any of the accounts maintained by said individuals, persons, firms, corporations, etc.?

The questions each relate to class A intangible personal property, and do not appear to directly involve any other class of intangible personal property. It is provided in §199.051(3), F. S., that: "Every company or corporation, domestic or foreign, shall on or before April 1 of each year, forward to the comptroller of the state, a list of all registered holders of its securities, of record as of the end of the preceding year, taxable under this section, whose mailing address on the records of the company or corporation or its agencies is within the state. . . ." There are other provisions in said §199.051(3), F. S., which may be material if applicable to class A intangible personal property.

An examination of said §199.051, F. S., reveals that the preliminary portion of said section reads as follows: "All class B intangible personal property shall be assessed at its just valuation as of January 1 of each year, in the following manner:" then follows subsections (1), (2) and (3), each of which is clearly limited by said initial paragraph to class B intangible personal property. The next unnumbered paragraph of the said section seems also to relate to class B intangible personal property, as do the next following unnumbered paragraphs of said subsection (3). This leads to the conclusion that §199.051, F. S., relates only to class B intangible personal property and has no application to class A intangible personal property.

Section 199.061(3), F. S., vests in the comptroller ". . . power to make such rules and regulations as may be necessary to carry out and execute the intent of Ch. 199, F. S." We are not advised of any rule or regulation requiring that the county assessor of taxes be provided with a list of shareholder accounts in building and loan associations, savings associations and other similar institutions, including deposits in credit unions. (§199.022(1)(b), F. S.)

Questions 1 and 2 are answered in the negative, insofar as Ch. 199, F. S., is concerned. We have no information of any rule of the comptroller making such a requirement; however, that question may be better answered by your office.

066-79—August 10, 1966

TAXATION—ASSESSMENT

SECTION 193.03, F. S.—MILLAGE ROLL BACK—CENTRAL AND SOUTHERN FLOOD CONTROL

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

1. Are the millages assessed by the central and southern Florida flood control district, under §3, Chs. 25214 and 25270, and Ch. 25209, Laws of Florida, 1949, required to be uniform and equal throughout the said district?

2. Are the roll back provisions of §193.03, F. S., as amended by §1, Ch. 65-258, applicable to the millages certified to the boards of county commissioners by the governing authority of the central and southern Florida flood control district, in those counties where a general revaluation was had and which is reflected on the county's 1966 tax roll?

The Fla. Sup. Ct., in a line of cases starting with Schleman v. Connecticut General Life Insurance Co., 151 Fla. 96, 9 So.2d 197, and presently ending with Burns, Governor, *et al.*, v. Butscher, Fla. 187 So.2d 594, has laid down the rule that the constitution and statutes of Florida require that each and every lot, parcel or tract of land, and each and every item of tangible personal property must be taxed for ad valorem tax purposes in this state on the basis of its "just valuation" which term has been held to be "legally synonymous" with the terms "full cash value" and "fair market value." (Walter v. Schuler, Fla., 176 So.2d 81, text 85 and 86; Tyson v. Lanier, Fla., 156 So. 833, text 837). By reason of the adoption of §7, Art. X, of the State Const., it became necessary that all taxable properties, both homesteads and nonhomesteads, be assessed at its "just valuation," which term has been held to be legally synonymous with the terms "full cash value" and "fair market value," (Walter v. Schuler and Tyson v. Lanier, *supra*), in order that there be uniformity and equality of taxation. (Cosen Investment Co. v. Overstreet, 154 Fla. 416, 17 So.2d 788; State v. McNayr, Fla., 133 So.2d 312, text 314; Walter v. Schuler, Fla., 176 So.2d 81, text 85).

Under §1 of the Declaration of Rights of the State Const., "All men are equal before the law," and under §1, Art. IX, of the said constitution, the Florida legislature is required to "provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal . . ." It is provided in Amendment XIV to the U. S. Const., that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Constitutional provisions, such as those above-mentioned, requiring equality and uniformity of taxation, lie at the foundation of the taxing power of the state, and have for their purpose the distribution of the burden of taxation evenly and equitably as far as practical. (84 C.J.S. 76 and 77; 51 Am. Jur. 201, §150; 30 Fla. Jur. 486 and 487, §56). "Equality and uniformity in taxation refer to an equality in the burden of taxation, so that no higher rate or greater levy in proportion to value is imposed on one person or species of property than on others similarly situated or of like character . . ." (84 C.J.S. 77, §22). "Under the constitution (Florida), the rate of taxation for state purposes should be uniform throughout the state,

for county purposes uniform throughout the county, for municipal purposes throughout the municipality, and for district purposes uniform throughout the district." (30 Fla. Jur. 487 and 488, §58).

The Sup. Ct., in Franks v. Davis, Fla., 145 So.2d 228, text 231, remarked, concerning §1, Art. IX, of the State Const. relative to the rate of taxation therein mentioned, that: "If rates cannot be varied directly, however, neither can the result be achieved indirectly by manipulation of the assessment basis upon which the levy is made. Such is the recognized intendment of our provision for a 'uniform and equal rate of taxation' as well as a 'just valuation of all property,' construed as securing equality of burden for ad valorem taxation in this state." Any rate (millage) of taxation imposed by the central and southern Florida flood control district throughout the 18 counties of the said district would accord equal protection of the laws for each landowner throughout the district so long as the assessment was on the basis of 100% of the "just valuation" of the lands so taxed, as defined in Walter v. Schuler, Fla., 176 So.2d 81, in each of the several counties of the said district. Question 1 is answered in the affirmative.

Question 2 has been changed and redrafted because it is reasonably possible that all of the several counties within the flood control district will be making their assessments on the basis of just value, that is, on the basis of 100% of fair market or full cash value. It appears self-evident that several of the counties within the flood control district will have had general revaluations which will be reflected on the 1966 tax rolls of such counties. This poses the application of the roll back provisions of §193.03, F. S., as amended by §1, Ch. 65-258, to such tax roll.

Said §193.03, F. S., as amended, insofar as here material, provides that:

> After the assessment rolls have been prepared on the basis required by law, the board of county commissioners and the board of public instruction and all other governing boards or governing authorities of all other taxing districts, within the counties including municipalities, whose taxes are assessed on the tax roll prepared by the county assessor, shall reduce the millage to be levied by each such governing authority from what it was in the preceding year proportionate to the increase of the general level of assessed value over the preceding year . . .

The above language "all other taxing districts, within the counties including municipalities," used in the said 1965 amendment, was the same as was used in the 1963 enactment. Section 54, Ch. 20722, 1941, omitted the phrase "within the counties" used in both the 1963 and 1965 enactments. The reference is to "taxing districts, *within the counties* including municipalities." (Emphasis supplied.) This seems to limit the operation of the statute to "taxing districts within counties" which would not appear to include multiple county taxing districts.

To include multiple county districts, especially where a roll back of millages would result in different millages in two or more counties, would raise a question of equal protection of the laws as between different counties within the multiple county district. When these things are taken into consideration, and the possible imposition of different millages in different counties, by reason of the operation of the roll back provisions in different counties, we hold that the roll back provisions of §193.03, F. S., have no application to the central and southern Florida flood control district.

We must presume that all counties within the flood control district

will be assessing 1966 taxes on the basis of the full just valuation of the real and tangible personal property of the district. To presume otherwise would be to presume that the counties within said district would be acting contrary to the law, as well as contrary to the requirements of the office of the comptroller.

Question 2 is answered in the negative; that is, §193.03, F. S., does not apply to the central and southern Florida flood control district, a multiple county district.

066-80—August 10, 1966

TAXATION—ASSESSMENT

CALCULATING GENERAL LEVEL OF ASSESSED VALUES FOR MILLAGE ROLL BACK PURPOSES

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

> **What classes of property should be included, and what classes should be excluded, when determining the total general levels of the assessed valuations of property in a county for the purpose of determining millage roll backs in accordance with §193.03, F. S.?**

Section 193.03, F. S., 1965, which section was derived from §1, Ch. 65-258, which amended §193.03, F. S., 1963, provides that: "After the assessment rolls have been prepared on the basis required by law, the board of county commissioners and the board of public instruction and all other governing boards or governing authorities of all other taxing districts, within the counties including municipalities, whose taxes are assessed on the tax roll prepared by the county assessor, shall reduce the millage to be levied by each such governing authority from what it was in the preceding year *proportionate to the increase of the general level of assessed value* over the preceding year. . ." (Emphasis supplied.) This same section further provides that: "the tax assessor shall maintain a separate list of all properties and improvements which are added to the tax rolls each year and a separate list of properties and improvements which are withdrawn from the rolls. The assessor shall certify to each budget making authority the ratio by which all millages must be reduced in order to comply with this section . . ."

The above-stated question raises the question of what is meant by "the general level of assessed value" of a county tax roll. Section 192.01, F. S., provides that: "Unless expressly exempted from taxation, all real and personal property in this state, and all personal property belonging to persons residing in this state, *shall be subject to taxation* in the manner provided by law." (Emphasis supplied.) "An assessment is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between individual subjects of taxation within the district." (84 C.J.S. 746, §391.) " 'Assess' primarily means to tax; secondarily or derivatively, to place a valuation on property for the purpose of apportioning a tax." (84 C.J.S. 749, §391) "The 'assessed valuation' of property is that value on each unit of which a prescribed amount must be paid in taxes in the future, and is a factor which with the tax rate is used to determine the amount of taxes to be charged against specific property." (84 C.J.S. 780, §410.) See also 4 Words and Phrases, Perm. Ed., 427-449, for definitions of the term "assessment" as used in connection with taxation. We are of the opinion that the phrase "shall reduce the millage to be levied by each such governing authority from what it was in the preceding year pro-

portionate to the increase in the general level of assessed value over the preceding year," has reference to a valuation made in connection with a tax assessment imposed or to be imposed for the purpose of raising tax funds for public purposes; the reference is not to a valuation of tax exempt properties against which no taxes may be imposed.

We are therefore of the opinion that the requirement that "the millage to be levied by each such governing authority" be reduced "from what it was in the preceding year proportionate to the general level of assessed value over the preceding" has reference to valuations of properties subject to taxation, from which revenue will be produced and has no reference to properties or interests in properties entitled to tax exemption. Section 7, Art. X, State Const., provides for tax exemption for homesteads up to an assessed valuation of $5,000. The $5,000 tax exemption for homesteads, provided for in said §7, Art. X, State Const., is a tax exemption differing little, if any, in law from other tax exemptions provided for in the State Const., or authorized by said constitution. This being true, the $5,000 tax exemption provided homesteads as aforesaid should not be taken into consideration when determining millages under said §193.03, F. S., for purposes of roll backs under said section. The taxable portion of the homestead valuation should be taken into consideration when calculating the said general level of assessed valuations.

The classes of property to be included in determining millage roll backs under §193.03, F. S., are those classes of properties subject to taxation in whole or in part; properties subject to taxation in part and entitled to tax exemption in part should be included as to their taxable valuations and excluded as to their tax exempt valuation; properties entitled to tax exemption in full should be excluded from such calculations. Section 193.03, F. S., being a taxing statute, should be construed against the taxing authority and in favor of the taxpayer. (State v. Gay, Fla., 40 So.2d 225, text 229; 51 Am. Jur. 366-368, §316; 84 C.J.S. 158 and 159, §58).

In addition to the above the tax assessor should "maintain a separate list of all properties and improvements which are added to the tax rolls each year and a separate list of all properties and improvements which are withdrawn from the rolls," which properties should be excluded and not included in determining millage roll backs. (See §193.03(6), F. S.)

066-81—August 11, 1966

MARRIAGE

CONSTRUCTION OF CONSANGUINITY—MARRIAGES PROHIBITED—§741.21, F. S.

To: George T. Clark, County Judge, Dade County, Miami

QUESTIONS:

1. Do the laws of Florida prohibit the marriage of a natural child to a child of the opposite sex adopted by the same parents?

2. Do the laws of Florida prohibit the marriage of two children of different sexes adopted by the same parents where the two children were not related at the time of their adoption?

Both of the foregoing questions call for the interpretation of §741.21, F. S., which reads as follows:

Incestuous marriages prohibited.—A man may not marry any woman to whom he is related by lineal consanguinity, nor his sister, nor his aunt, nor his niece. A woman may not

marry any man to whom she is related by lineal consanguinity, nor her brother, nor her uncle, nor her nephew.

We must assume, of course, that the children referred to in your questions are not related by lineal consanguinity.

"Consanguinity" means the connection or relation of persons descended from the same stock or common ancestor, and is either lineal or collateral. "Lineal" is that which subsists between persons of whom one is descended in a direct line from the other. "Collateral" kindred descend from the same stock, but differ from the lineal in that they do not descend one from the other. See State v. De Hart, 109 La. 570, 33 So. 605.

Assuming also that the children referred to in your questions do not share the relationship of aunt or uncle, and niece or nephew, we must determine whether they are brother or sister as contemplated by the statute. It will be noted that the statute prohibits marriage between persons related by consanguinity (blood), but, unlike the statutes of some of our sister states, does not prohibit intermarriage between persons related by affinity (marriage).

It would, therefore, appear that in enacting this statute the legislature considered a genetic as well as a moral philosophy.

I am, therefore, of the opinion that persons not related by blood, but sharing only a legal relationship brought about solely as the result of the adoption of one by the adoptive or natural parent or parents of the other, where such persons are otherwise lawfully qualified to enter into a lawful marriage with each other, are not prohibited because of such relationship to marry each other.

Thus, both of your questions are answered in the negative.

066-82—August 11, 1966

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—CREDIT UNION INTERESTS

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. Are interests and deposits in credit unions, state or federal, subject to taxation in this state as intangible personal property?

2. May the comptroller require that credit unions, state or federal, doing business in this state, furnish lists of their members and depositors to the county tax assessor of their county, or to the said comptroller, for use in connection with the enforcement of Ch. 199, F. S.?

Credit unions are provided for in Ch. 657, F. S., and are regulated by said chapter. Federal credit unions are provided for in §§1751 to 1775, title 12 of the U.S.C. Such credit unions are defined as institutions organized for the purpose of promoting thrift among its members and creating a source of credit for them at legitimate rates of interest for provident or productive purposes (Ch. 657, F. S., and §1752, title 12, of the U.S.C.).

Under §1768, title 12 of the U.S.C., federal credit unions, organized and established under §§1751-1772 of said code, "their property, their franchises, capital, reserves, surpluses and other funds, and their income shall be exempt from taxation . . . except that any real property and any tangible personal property of such federal credit unions shall be subject to federal, state, territorial and local taxation, *to the same extent as other similar property is taxed.* Nothing herein contained shall

prevent *holdings in any credit union* organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the state or political subdivision thereof in which the federal credit union is located; but the duty or burden of collection or enforcing the payment of such a tax shall not be imposed upon any federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions." (Emphasis supplied.) Although the first part of the above-quoted language seems to provide for tax exemption, subsequent portions of the said section provide certain exceptions from the said tax exemption, there permitting state and local taxation of the exceptions from the general tax exemption, as provided for in said §1768, title 12 of the U.S.C. The "real and tangible personal property" of the federal credit unions appears to be subject to taxation against the credit union itself; however, this imposition of taxes may not exceed the taxes imposed on like and similar properties under state authority; this is a limitation on the taxing authority.

Said §1768, title 12 of the U.S.C. does not "prevent holdings in any federal credit union organized (under said section and title) . . . from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of" a state or its political subdivision. This language gives permission to impose taxes on the value of memberships and shares of stock issued to members and such other property interests members may have in holdings in the said credit union.

Shares in credit unions and their obligations to their members are validly classified as intangible personal property, and subject to classification as class "A" intangible personal property if and when subject to taxation. Said §1768, title 12, of the U.S.C., seems to provide that holdings in the federal credit unions may be taxed by being "included in the valuation of the personal property (intangible) of the owner or holder thereof." This would seem to permit such property to be included in the owner's intangible tax return as class "A" intangibles, as defined in §199.022(1), F. S.

The above-stated question 1 is answered in the affirmative, so long as state and federal credit unions are so taxed and there is no discrimination between federal and state credit unions.

The above-stated question 2, as applied to federal credit unions, is answered in the negative, by reason of the latter portion of said §1768, title 12, of the U.S.C., which provides that the "duty or burden of collecting or enforcing the payment of such a tax shall not be imposed upon any such federal credit union;" however, this language does not seem to amount to a prohibition against the voluntary furnishing of such information by such federal credit union, but at its discretion only.

Question 2, as applied to state credit unions, is answered in the negative as class "A" intangibles are not within §199.051, F. S.

066-83—August 11, 1966

COUNTY OFFICERS AND EMPLOYEES

MILEAGE PAYABLE TO COUNTY COMMISSIONERS FOR OFFICIAL BUSINESS TRAVEL

To: Ernest Ellison, State Auditor, Tallahassee

QUESTIONS:

1. Are the limits, provided in Ch. 61-1313, Laws of Florida, as amended, placed on the mileage for which a board member may be reimbursed applicable to total mileage traveled on

all and any official business within the county and state and without the state?

2. If the answer to question 1 is affirmative, how do such limits imposed by Ch. 61-1313, as amended, affect the applicability of Ch. 59-667, Laws of Florida?

3. Assuming that Ch. 61-1313, Laws of Florida, as amended, is applicable, does the provision that mileage is payable upon the written and signed statement showing and stating the number of miles traveled officially by the commissioner mean that the commissioner need only to bill for the total miles traveled during a month without having to itemize for pre and postaudit purposes the mileage as to dates, places traveled to and from, etc.?

4. Assuming that Ch. 61-1313, Laws of Florida, as amended, is the governing law, may a board member charge mileage to and from board meetings as travel on official business under the provisions of Ch. 61-1313, as amended by Ch. 65-1881, Laws of Florida?

5. Would it be legally possible for the board to elect to charge mileage pursuant to the provisions of §112.061, F. S., rather than as provided in Ch. 59-667, and Ch. 61-1313, as amended by Ch. 65-1881, Laws of Florida?

Although your request for opinion of July 26, 1966, related to special and local laws applicable to Manatee county, we have prepared an official opinion in which we discuss the above questions in the hope that this opinion may be of assistance to you in the audit of books and records of other counties involving like and similar questions, and also knowing that numerous other local and special acts have been enacted dealing with the fees and mileage of county officers and commissioners, etc. Your request for opinion makes specific mention of Chs. 59-667, 61-1313 and 65-1881, Laws of Florida, which laws deal with the mileage of the county commissioners of Manatee county, in connection with the administration of the affairs of the county by its board of county commissioners, including the inspection of county roads and bridges, and the carrying on of the official business of the county, and whether or not the phrase "official business" as used in Chs. 61-1313 and 65-1881, embraces the inspection of roads and bridges as used in Ch. 59-667.

Said Ch. 59-667, provides that: ". . . the County Commissioners of Manatee County in addition to their statutory salary, shall each be entitled to mileage at the rate of ten cents ($.10) per mile by each of them actually traveled for *the inspection of roads and bridges in their respective districts* up to but not exceeding *seven hundred and fifty* (750) *miles per month.*" (Emphasis supplied.) Chapter 61-1313, provided that: ". . . county commissioners of Manatee county, in addition to their statutory salary, shall each be entitled to mileage at the rate of ten cents ($.10) per mile by each of them actually traveled *on any official business* of the county of Manatee *not to exceed one thousand miles or* $100." (Emphasis supplied.) The limitation of 1,000 miles or $100, abovementioned, was changed by the amendment made by Ch. 65-1881, to 2,000 miles or $200, this being the only material change made by the said 1965 amendment. It is provided in said §2, Ch. 61-1313 thereof, that such mileage shall be payable monthly from the general fund to each commissioner upon his written and signed statement showing and stating the number of miles traveled by him on official business during the preceding month.

Said Ch. 61-1313, and as amended by Ch. 65-1881, provide mileage

for county commissioners when traveling on any official business; Ch. 59-667 provided mileage for county commissioners for "the inspection of roads and bridges." This poses the question of whether or not "the inspection of roads and bridges" of the county is an official business of boards of county commissioners under said Chs. 61-1313 and 65-1881.

Under §336.02, F. S., "The county commissioners are invested with the general superintendence and control of the county roads and structures within their respective counties, and may establish new roads, change and discontinue old roads, and keep the same in good repair in the manner herein provided. They shall be responsible for establishing the width and grade of such roads and structures in their respective counties." See also the powers and duties of boards of county commissioners in connection with county roads, bridges and other structures under §125.01, F. S., especially subsections (1), (5) and (13) thereof. From these statutes, authorities and observations it appears that the "inspection of roads and bridges" is one of the official duties of boards of county commissioners and is a part of the official business of boards of county commissioners of a county. This being true, Ch. 61-1313, and said chapter as amended by Ch. 65-1881, superseded and replaced the provisions in said Chs. 61-1313 and 65-1881, and repealed the provisions in said Ch. 59-667, for mileage so that said Ch. 61-1313, as amended by Ch. 65-1881, is the applicable statute and said Ch. 59-667 is no longer applicable. Mileage for the "inspection of roads and bridges" by county commissioners is now governed in Manatee county, by said Ch. 61-1313, as amended by Ch. 65-1881, instead of Ch. 59-667.

Section 1, Ch. 61-1313, as amended by §1, Ch. 65-1881, provides that: "The Board of County Commissioners of Manatee County, . . . shall each be entitled to mileage at the rate of ten cents (10¢) per mile by each of them actually traveled on *any* official business of the County of Manatee not to exceed 2,000 miles or $200." (Emphasis supplied.) This seems to relate to the total mileage traveled by a county commissioner on any official business of the county. This seems to be a limitation to any or all the official business of the county, within or without the said county.

The above-stated questions are answered as follows:

1. Question 1 is answered in the affirmative.

2. Chapter 59-667, having been replaced and repealed by Ch. 61-1313, as amended by Ch. 65-1881, has no applicability here.

3. The clerk of the circuit court, as ex officio preauditor for the county, under §6, Art. V, State Const., and the state auditing department, as postauditor for the state, under Ch. 21, F. S., are entitled to sufficient information from which to make their audits of the county commissioners' compensation for mileage as aforesaid, which information must be such as will permit such pre and postaudits. See §21.111, F. S., in this connection.

4. It is the duty of county commissioners to attend board meetings at the official place of the holding of such meetings; such commissioners are not entitled to mileage when going to and from such official meetings at the usual place of meeting. However, if an official meeting were held at a place other than the official headquarters, the commissioner would be entitled to mileage from headquarters to the place of official meeting.

5. Question 5 is answered in the negative. Under §112.061(1)(b), F. S., we feel that said Chs. 61-1313 and 65-1881 are the controlling law under the facts and circumstances here involved.

We do not think that the letters of Sept. 22, 1965, May 18, 1966, and July 20, 1966, mentioned in your request for opinion, are in conflict with the conclusions hereof when said letters and this opinion are construed together and in the light of applicable statutes and laws.

066-84—August 22, 1966

TAXATION

SECTION 193.03, F. S., ROLL BACK PROVISIONS—APPLICABILITY TO BUILDING FUND MILLAGES UNDER §135.01, F. S., TO COUNTY PORTION OF COUNTY HEALTH UNIT BUDGET

To: Fred O. Dickinson Jr., State Comptroller, Tallahassee

QUESTIONS:

1. Are the roll back provisions of §193.03, F. S., applicable to building fund millages levied under §135.01, F. S.?

2. Are the roll back provisions of §193.03, F. S., applicable to the county's portion of the county health unit budget, as to the advertising of notices of public hearings for millage increases after roll back?

Question 1 involves §135.01, F. S., which provides that:

> Whenever any board of county commissioners shall deem it necessary to erect or repair any courthouse, jail, or other county building, . . . they shall give notice for thirty days in some newspaper published in said county, . . . that at the next regular meeting of the board after the publication of the said notice, such question or questions, will be acted upon by said board. If, at said meeting, a majority of said board shall determine that it is necessary to erect, repair, or build addition or additions to, such building or buildings, they may levy a building tax not exceeding five mills per annum, for not more than thirty consecutive years in lieu of all other county building tax. The tax levied shall be assessed and collected at the same time and in the same manner as other state and county taxes are levied and collected.

This section should be read and construed with §135.02, F. S.

It appears from Borland v. Towles, 69 Fla. 125, 67 So. 640, that the board of county commissioners may, under §§135.01 and 135.02, F. S., either accumulate the amount necessary for the contemplated construction before commencing same, or may issue bonds or revenue certificates in anticipation of the collection of the said tax, pledging the said tax for the payment of such obligations. Whether or not §6, Art. IX, of the State Const., must be complied with must be determined from the applicable facts in each case.

This is clearly a tax levied by the board of county commissioners, levied upon the tax roll prepared by the county assessor, within the purview of §193.03, F. S., and subject to the roll back provisions of said section, unless, under the facts and circumstances in each separate case, such a roll back would be in violation of the contract clause of the federal constitution, in which case such roll back must conform to the requirements of such federal constitutional requirements.

Question 1 is answered in the affirmative, subject to any facts and circumstances bringing in play the contract clause of the federal constitution.

Section 154.01, F. S., authorizes cooperation between county public health units and the state board of health in the establishment and maintenance of full-time local health units. For the purpose of such cooperation, §154.02, F. S., authorizes the levy of an annual millage,

as set out in said section by the cooperating counties, which tax funds, when collected:

> . . . shall be paid to the state board of health for deposit with the state treasurer. Such funds in the hands of the state treasurer shall be known as the full-time local health unit trust funds for the county by which such funds were raised; and said funds shall be expended by the state board of health solely for the purpose of carrying out the intent and object of this chapter in such county. . . .

These county funds are combined with state and federal funds from which the public health laws of the state are carried out and enforced, as a joint project of the county, the state and the federal government. These funds are expended in accordance with agreements between the county, Florida, and the United States, each of which contributes to the said fund. The county's portion of these funds is county funds raised by county taxation, and is imposed by the board of county commissioners for such purpose, although when collected they are paid into a trust fund in the state treasury, consisting of county funds, state funds and federal funds.

The county's contributions to the trust funds, above-mentioned, in the state treasury, are county funds within the purview and intention of §193.03, F. S., and subject to its roll back provisions, except to the extent that such funds may be within the contract clause of the federal constitution, which, if present, is not readily apparent. This answers question 2 in the affirmative for all practicable purposes. This ruling relates only to the county portion of the fund. The provision for 10% increase, if desired, is applicable to the county portion of the fund.

066-85—August 22, 1966

SHERIFFS

BUDGET—JURISDICTION OF COUNTY COMMISSION UPON FAILURE TO ACT PRIOR TO AUGUST 1 OF YEAR SUBMITTED

To: Earl S. Dyess, Sr., Sheriff, Hendry County, LaBelle

QUESTION:

> **Where a sheriff presents his budget to the board of county commissioners in timely fashion and said board of county commissioners fails to take any action with regard to the proposed budget prior to Aug. 1 of the year in which the budget is presented, does the board of county commissioners retain any jurisdiction to amend, modify or reduce the budget subsequent to the Aug. 1 date?**

Section 30.49, F. S., relating to the budgets of sheriffs, provides in part:

> (3) . . . No later than August 1 of each year, the said board or commission, as the case may be, may amend, modify, increase or reduce any or all items of expenditure in the proposed budget and, as amended, modified, increased, or reduced, shall approve said budget, giving written notice of their action to the sheriff specifying in such notice the specific items so amended, modified, increased or reduced; . . .

In answering question 2 posed in AGO 060-42, of the 1959-60 biennial report of the attorney general, p. 506, it was said:

> . . . where no action is taken by the board of county commis-

> sioners prior to August 1 of the tax year, the budget *probably* stands approved unless some action is taken thereon by the county board. (Emphasis supplied.)

This language suggests that it was the thought at that time that perhaps the county commissioners might take some initial action in amending, modifying, increasing or reducing a sheriff's budget subsequent to Aug. 1.

Since the publication of that opinion in 1960, the board of appeals of county officers' budgets provided for in §30.49(3), F. S., has held in its order of Aug. 29, 1961, regarding the budget of the Martin county sheriff, and again in its order of Sept. 20, 1961, regarding the budget of the Charlotte county sheriff, that the board of county commissioners "lost jurisdiction of the matter under §30.49(3), F. S.," where said board failed to furnish the sheriff with written notice of their intention to amend, modify, increase or reduce his budget prior to Aug. 1. The orders further concluded that where the county commission failed to furnish the sheriff with written notice prior to Aug. 1, the board of appeals of county officers' budgets was likewise without jurisdiction to review the matter.

The language of the statute requiring the board of county commissioners to furnish written notice to the sheriff prior to Aug. 1 appears clear and unmistakable and where legislative intent in a statute is clearly manifest by the language used in its ordinary grammatical sense, the rules of statutory construction are unnecessary and the statute must be given its plain and obvious meaning. Brooks v. Anastasia Mosquito Control District, Fla.App., 148 So.2d 64; Clark v. Kreidt, 145 Fla. 1, 199 So. 333, and Maryland Casualty Co. v. Sutherland, 125 Fla. 282, 169 So. 679. The reason for this rule and the construction placed upon the statute by the board of appeals of county officers' budgets appears to have been ably explained in the correspondence between this office and Hon. Halley B. Lewis, county attorney of DeSoto county, dated Aug. 20, 1964, when Mr. Lewis was advised concerning a review of the sheriff's budget by the board of county commissioners. Mr. Lewis was advised as follows:

> The above quoted statutory provision (§30.49(3), F. S.), goes on to permit the Sheriff an appeal to the Board of Appeals of County Officers' Budgets. In such appeal the Sheriff must state the 'reasons and grounds' for his appeal. The written notice of the specific actions that the Board has taken is the predicate upon which the Sheriff is to base his appeal. Without such notice he cannot frame an intelligent or legally sufficient petition to the Board of Appeals of County Officers' Budgets. (Parenthetical matter added.)
>
> Accordingly it appears that in order for the Board of County Commissioners' modification of the Sheriff's budget to be effective, notice of said modification must be given in writing prior to August 1. Said notice not having been given in writing, the Board of Appeals of County Officers' Budgets would not now have jurisdiction to review the matter and it appears that the County Commissioners through their failure to comply with the statutory requirement in effect approved the Sheriff's proposed budget as submitted.

Although not material to the question considered herein, it might be pointed out in passing that Mr. Lewis was further advised that a parol agreement between the board of county commissioners and the sheriff would be of dubious validity since §30.49(3), F. S., requires the county commissioners to furnish their notice in writing and for

other reasons as well explained in that letter.

Accordingly, it would appear from the above and foregoing comments and authorities that the answer to question 2 of AGO 060-42, *supra*, should be modified to the extent that the sheriff's budget is considered as approved unless some action is taken by the board of county commissioners to amend or modify said budget prior to Aug. 1, and that upon their failure to advise the sheriff in writing prior to that date the board of county commissioners loses jurisdiction over the subject matter and the question is not therefore subject to review by the board of appeals of county officers' budgets.

Based upon the above and foregoing your question as set out above is answered in the negative.

066-86—August 24, 1966

TAXATION

POWERS AND DUTIES OF COUNTY BOARDS OF TAX EQUALIZATION—TAX VALUATIONS

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

May boards of county commissioners, sitting as boards of tax equalization, as authorized in §§193.25, 193.27 and 200.10, F. S., refuse certification and approval of county tax rolls submitted to them by the tax assessors, where the valuations thereon, in the opinion of the said board of tax equalization, are not as required by the Constitution and Statutes of Florida as construed by the Supreme Court of Florida in its recent opinions?

It is clear from the opinions of the Sup. Ct. of Fla., in Burns *et al.* v. Butscher, *et al.*, recently decided but not yet reported in the Southern Reporter; Walter v. Schuler, Fla., 176 So.2d 81; Tyson v. Lanier, Fla., 156 So.2d 833; McNayr v. State, Fla., 166 So.2d 142; State v. McNayr, Fla., 133 So.2d 312, text 314; Cosen Investment Co. v. Overstreet, 154 Fla. 416, 17 So.2d 788; Schleman v. Connecticut General Life Ins. Co., 151 Fla., 96, 9 So.2d 197, and other cases, that all real and personal property in this state subject to taxation, in whole or in part, must be valued for tax purposes upon the basis of its "just valuation," which term has been held to be legally synonymous with "fair market value" and "full cash value." (Walter v. Schuler, Fla., 176 So. 81, text 85 and 86; Tyson v. Lanier, Fla., 156 So.2d 833, text 837.)

This requirement is well established; however, the above-stated question poses the question of the power and authority of the boards of county commissioners to require that valuations be brought up to "just valuation" when they deem all valuations to be below or above such required basis of valuation, as a condition to their approval and certification of such tax roll, or to direct the county assessor of taxes to bring the valuations on his tax roll up to said required "just valuation." This also poses the question of the jurisdiction of the county boards of tax equalization under §§193.25, 193.27 and 200.10, F. S., to require a general increase of the levels of valuation of properties on the county tax roll in order to equalize such valuations with other taxable valuations on the tax roll, and homestead properties with nonhomestead properties.

Section 193.25, F. S., requires that county tax assessments by the

county tax assessors be completed on or before the first Monday in July of each tax year, on which day the tax assessor of the county is required to meet with "the board of county commissioners at the clerk's office of their respective counties for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes, of perfecting, reviewing and equalizing the assessment. . ." Section 193.27, F. S., provides that for the purpose of equalizing tax valuations the board of equalization "may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property." These statutes do not appear to have been changed materially since §§25 and 26 Ch. 4322, 1895, a period of more than 75 years.

Tax equalization appears to be of 2 types: first, equalization between counties and other taxing districts; and second, equalization between taxable properties within the county or taxing district. The equalization of taxes under §§193.25 and 193.27, F. S., is of the above second classification (84 C.J.S. 925, §489); that is, a review of assessments on particular pieces of property and among individual taxpayers. The function of the county commissioners in this state, sitting as boards of tax equalization, is the adjustment of property valuations between different owners so that the share of the whole tax imposed on each taxpayer will be justly proportioned to the value of each piece of such taxable property to all other taxable properties within the county or taxing district. This can be accomplished only when all taxable properties within the county or taxing district are assessed on the basis of their just valuation, which term has been held by the Sup. Ct. of Fla. to be legally synonymous with the terms fair market value and full cash value.

It is stated in Sparkman v. State, 71 Fla. 210, 71 So. 34, text 41, that:

> The county commissioners have no general power in making tax assessments but only such *special and limited power* as is specifically conferred by statute to secure equalization of tax values. When that power, as specifically conferred, is exercised and final adjournment is taken, their special power as a board of equalization ceases. (Emphasis supplied.)

Cited with approval in Saunders v. Crapps, Fla., 45 So.2d 484, text 488; and Saunders v. State, Fla., 46 So.2d 491, text 494. In Lee v. Booker, 108 Fla. 534, 146 So.2d 546, the Sup. Ct. of Fla. remarked that:

> The law contemplates that individual complaints against particular tax assessments which may be discriminatory as to valuations between persons or properties subject to taxation shall be submitted (by the owner or his agent) to the duly constituted county equalization board for adjustment. (Parenthetical matter added.)

This language seems to make it the primary duty of taxpayers to bring to the attention of the equalization board inequalities affecting their taxable properties. This seems to indicate that each taxpayer has a duty to look after his own property and protest inequalities between his assessment and other assessments that are to his detriment. This objecting, being personal to the taxpayer, may be waived. (Lee v. Booker & Co., *supra.*) Other inequalities may arise by reason of undervaluations as well as overvaluations of taxable properties, but which do not amount to specific inequalities of individual taxpayer to taxpayer.

Of the latter class of inequalities may be mentioned the undervaluation or overvaluation of homestead properties within the purview of §7, Art. X, of the State Const.; the valuation of farm or timber lands on a different ratio of tax valuation than are residential or business area

properties; for example, farms and timber lands on the basis of 50% of just valuation and residential and business area properties on the basis of 75% of just valuation. Although these discrepancies may not injure one property owner specifically, when compared with like property owners, the different classes of property owners will be materially affected, although specific owners may not be.

The Sup. Ct. of Fla., has more than one time held that an assessment of all properties uniformly on a basis of less than "just valuation" is a denial of equal protection. For example, a valuation of 50% of "just valuation" will deny to the nonhomesteaders the equal protection of the laws; an assessment on the basis of greatly in excess of "just valuation" will be a denial of the equal protection rights of the homesteaders. These observations point up a need for equalization in instances where the individual taxpayers make no specific objection as to the valuation of their specific properties.

Under §§193.25 and 193.27, F. S., county boards of tax equalization sit for "the purpose of hearing complaints and receiving testimony as to the value of any property," and "of *perfecting, reviewing* and *equalizing* the assessment," and for that purpose "may raise or lower the value fixed by the county assessor of taxes *on any particular piece of real estate,* or *item or items of personal property.*" (Emphasis supplied.) This authority seems to be limited to the raising or lowering of the valuations placed on particular pieces or items of property. Said §§193.25 and 193.27, F. S., appear to have originated as §§25 and 26 of Ch. 4322, Acts of 1895, and should be read and construed together.

The office of tax assessor in Florida is a constitutional office authorized by §6, Art. VIII, of the State Const., and is the office generally charged with the assessment of county ad valorem taxes in this state. Although the Sup. Ct. of Fla. has upheld the power of the Florida legislature to establish a board of tax equalization, that board's duties are in the nature of the equalization of individual tax assessments rather than that of a tax assessing agency, and has no power or authority to fix the original valuations of taxable properties in Florida for purposes of ad valorem taxation. The said board is more in the nature of a correction agency than an assessing agency.

In the light of these observations and statutes and laws cited, we must answer the above-stated question in the negative.

In those cases where a board of tax equalization may feel "that the values on the tax roll, or any part thereof, are generally either in excess or below" the "just valuation," which term has been deemed by the Sup. Ct. of Fla., to be legally synonymous with "fair market value" and "full cash value," such board causes the information or evidence to be filed with the state comptroller for such action as he may deem proper under §192.31, F. S., as recently construed by the Sup. Ct. of Fla., in Burns v. Butscher, Fla. 187 So.2d 594.

066-88—September 15, 1966

PUBLIC RECORDS

SUBJECTION TO PUBLIC INSPECTION—CONSTRUCTION OF §119.01, F. S.

To: Ernest Ellison, State Auditor, Tallahassee

QUESTION:

Are the work papers, work sheets, papers used in making arithmetic computations or notes, or interoffice correspondence

on items or matters under examination, etc., all for the benefit of the auditor, to be considered as "public records" of the state within the purview of Ch. 119, F. S.?

The general rule is found stated in 76 C.J.S., Records, §36, p. 137, which provides:

> Generally speaking, any document which may properly be considered a public record is subject to inspection, and, where inspection is sought under a statute, the terms of the statute as reasonably construed determine the records subject to inspection.

Said cited section points out particular records which have been held subject to inspection as well as various records which have been held not subject to inspection. Included among those held not subject to inspection are records of administrative or executive offices, agencies or departments of the government which are kept merely as evidence of the transactions involved, records of an insane asylum, records of pawnbrokers' transactions filed by them with specified officers under the provisions of the statute, state secrets such as diplomatic correspondence, records in the offices of those charged with the execution of the laws relating to the apprehension, prosecution, punishment or parole of criminals, and generally records inspection of which would be detrimental to the public interest or such as are specifically exempted or prohibited by statute.

Two distinct questions must be considered in answering your question as posed:

1. Do the work papers, etc., referred to in your question constitute "public records" within the purview of §119.01, F. S.?

2. If we conclude that the work papers, etc., are "public records," would they nevertheless fall within the prohibition of the rule that access to such records should not be allowed as against public policy?

This office is of the opinion that the work papers, etc., referred to by you are not "public records" within the purview of §119.01, F. S. Further, this office is of the opinion that even if such work papers, etc., were "public records" within the purview of §119.01, F. S., access to such information should be denied as a matter of public policy.

In the case of State v. Freedy, 223 N.W. 861, a question arose as to whether or not a fire marshal should be required to allow inspection of reports made to the fire marshal by investigators who had investigated into the origin of fires. In that case the court held that the reports to the state fire marshal by the investigators were not open to public inspection. In said case there was a Wisconsin statute which required the state fire marshal to keep certain records. In reaching its conclusion, the court stated:

> The investigations themselves are not to be made matters of record. It is merely his determinations based upon such investigations that are to be made matters of record. Such determinations are in the nature of statistics, or at least they may be compiled as statistics, and such statistics, by the mandate of the statute, become records and are to be open to public inspection. The various reports, correspondence and examinations made with reference to any particular fire carry no public interest, but statistics covering all fires, showing their causes, the facts and circumstances under which they originate, have an educational value, and this is what the Legislature intended to make available to the public.

The court further pointed out that the manifest purpose of the

law was to apprehend and punish those who may be guilty of the crime of arson. It then went on to say that if the substance of all these investigations was made public, the purpose of the law would be frustrated.

In the Wisconsin case there was also a statute referred to similar to our §119.01, F. S. The court concluded that since these investigators' reports were not "public records," they were not within the purview of the Wisconsin statute.

Similarly in Florida there is a statute requiring that the state auditor retain certain records. Section 21.121, F. S., states that: ". . . the auditor (here the statute is referring to the auditors and accountants hired by the state working under the supervision of the state auditor) shall report his findings for review by the state auditor, who shall prepare the *audit report.*" (Emphasis supplied.) Section 21.121-(3), F. S., states that the audit report shall be a public record. It further states that:

> . . . One copy shall be filed as a permanent record of the state auditing department. . . . (Here the statute is referring to the audit report, *not* the findings of the auditors and accountants working under the supervision of the State Auditor.) (Parenthetical matter added.)

Clearly had the legislature intended that the findings or any work papers or mathematical computations utilized by any of the assistants of the state auditor in reaching their findings which they in turn presented to the state auditor should be included and made a part of the public audit report, it could have done so. Since it did not, we must conclude that the legislature did not intend that such findings be considered as "public records."

A similar result was reached in the case of Coldwell v. Board of Public Works, 202 P. 879. In that case the court found that estimates, plans, etc. prepared by subordinates of the city engineer were not "public records" and accordingly were not open to the public as such.

The case of Clement v. Graham, 63 A. 146, involved a mandamus action to compel the auditor of accounts to exhibit vouchers which were required by law to be kept by him to substantiate payments. This case stated that since the vouchers were required by law to be kept, these were "public records." This decision is entirely in keeping with the conclusion previously reached by this office. In Florida there is no law requiring that the findings of the auditors and accountants working under the supervision of the state auditor be kept as "public records."

Clearly the items referred to in your question are not "public records" within the purview of §119.01, F. S.

The Florida case of Patterson v. Tribune Co., Fla., 146 So.2d 623, recognizes the rule stated as follows:

> Generally public records are subject to right of inspection and publication, but such right does not apply to all public records since public policy requires that some, although of a public nature, be kept secret and free from public inspection.

Also see Lee v. Beach Publishing Co., 173 So. 440.

These work papers, etc., which are utilized by auditors and accountants working under the supervision of the state auditor are merely computations evidencing and providing a basis for an ultimate determination. No final determination is reached until after all of this information is assimilated. These work papers, etc., do not appear to be of continuing significance. They are merely mathematical and mechanical steps used in arriving at a final determination. They do not become final until approved by the state auditor. He is the only officer

who has the authority to make the final determination as to the correctness of that which has been submitted to him by any of his subordinates.

This office is cognizant of accounting procedures and realizes the necessity for the closeness of scrutiny as well as the possibility of error. It is mandatory that such work papers, etc., be withheld from the public until such time as their correctness can be conclusively determined and until such time as these work papers, etc., can be presented in the nature of a formal finding to the state auditor and approved by him. Were all these work papers, etc., considered as open to the public, it could be extremely detrimental to the public interest. Innocent persons might well be adversely affected. The work of the state auditor would be greatly hampered. Public policy demands that such work papers, etc., be withheld from the public.

Might I also refer you to the case of Lefebvre v. Somersworth Shoe Co., 41 A.2d 924, and AGO's 041-126, 050-510, 053-223, 057-157 and 061-102.

Your question is answered in the negative.

066-89—September 19, 1966

GOVERNOR

STATUS OF MOTOR VEHICLES OWNED AND MAINTAINED BY STATE ROAD DEPARTMENT FOR USE BY THE GOVERNOR

To: Ernest Ellison, State Auditor, Tallahassee

QUESTION:

> **May any portion (in view of the hereinafter stated facts and circumstances) of the funds of the state road department be expended and disbursed to provide a limousine, passenger car and pickup truck, for use by the governor, his staff, and the mansion?**

We gather from your request for opinion that funds of the state road department have been expended and disbursed by that agency for the purchase and maintenance of a limousine, passenger car and pickup truck, which have been assigned to and are used by the governor, his staff, and the mansion, title to which have been vested in the said state road department.

General information indicates that governors prior to the Hon. Doyle E. Carlton, who served as governor of Florida during the years 1929-1932, purchased, owned and maintained their own motor vehicles; however, beginning with governor Carlton's term of office, the state, through the state road department or other state agency, has provided a motor vehicle for the official use of the governor. Whether or not the expenses of the operation of these motor vehicles was that of the governor's office or of the state road department or other agency, during the period of time during and since the administration of governor Carlton, is not clearly apparent; however, in your request for opinion you state that the "State road department has traditionally for many years furnished the governor's office a limousine and paid the operating cost thereof." It appears from your said request for opinion that presently, in addition to the limousine, there is also being owned and maintained by the said road department, a passenger car and pickup truck, assigned to serving the governor, his staff and the mansion.

The Florida legislature, by Ch. 5472, 1905, made provision for the acquisition of a site for the governor's mansion and for the erection, building and furnishing of such a mansion for the use of the governor of Florida and his family, which mansion was replaced by a new mansion constructed as provided for in item 7 of §2, Ch. 28115, 1953. Chapter 5604, 1907, provided funds for furnishing the said governor's mansion. Chapter 5882, 1909, provided for the improvement of the grounds of the governor's mansion. Appropriations for the operation of the governor's mansion have been provided for in 1935-1965, and probably prior years. The furnishing of Florida's governor with a mansion and its maintenance and upkeep has been provided for by law since Ch. 5472, 1905, and has become a state policy.

Although we find nothing in the constitution or statutes of Florida expressly providing for the furnishing of motor vehicles for the use of the governor, such has been the long-standing policy of the state, dating back some 30 or more years. It has been the policy of the state road department for many years last past to purchase such motor vehicles with state road department funds for the use of the governor, and the department of public safety to assign a highway patrolman to the governor as his chauffeur (§321.04(1), F. S.). A highway patrolman has been assigned to the governor's office as aforesaid since the enactment of Ch. 26800, 1951.

In case of doubt as to the meaning of a statute, departmental construction will be given great weight and courts do not usually adopt a contrary interpretation except for most cogent reasons, except in case such construction is clearly erroneous. (Green v. State, Fla., 166 So.2d 585, text 588; Henderson v. Sol Walker and Co., Fla., 138 So.2d 323, text 327; Southeastern Utilities Service Co. v. Redding, Fla., 131 So.2d 1, text 2; Fidelity Construction Co. v. Arthur J. Collins & Son, Fla., 130 So.2d 612, text 613; Miller v. Brewer Co., Fla., 122 So.2d 565, text 566; State v. Ring, Fla., 122 So.2d 4, text 6; United States Gypsum Co. v. Green, Fla., 110 So.2d 409, text 414; Florida State Racing Comm. v. McLaughlin, Fla., 102 So.2d 574, text 576 and 577; Green v. Stuckey's Fanning Springs, Inc., Fla., 99 So.2d 867, text 868; State v. Massachusetts Co., Fla., 95 So.2d 901, text 907). Likewise contemporaneous constructions and long acquiescence in a particular construction are entitled to great weight. (Johnson v. State, Fla., 91 So.2d 185, text 187.) See also 30 Fla. Jur. 206-207, §103; 50 Am. Jur. 309-312; and 82 C.J.S. 758, *et seq.*, §§357-359.

The practice of furnishing the governor with motor vehicles during his term of office, and maintaining them during that period of time, together with the statutes providing for the assigning of a highway patrolman to the governor as his driver during said period of time, including the furnishing of such motor vehicles by the state road department, having been carried out over a long period of time, doubtless with the full consent of the legislature, amounts to a departmental and contemporaneous construction of the statutes and laws of Florida, which should not be changed by this office.

066-90—September 22, 1966

STATE FINANCIAL AFFAIRS

CONTRACTS INVOLVING EXPENDITURE OF FUNDS BEYOND LEGISLATIVE BIENNIUM—EXPENDITURE OF UNAPPROPRIATED FUNDS

To: Al J. Day, Acting Director, State Purchasing Commission, Tallahassee

QUESTION:

May state funds which have not been appropriated by the legislature be encumbered by a state agency's entering into a contract wherein the expenditure of state funds is involved beyond a legislative biennium?

Probably the most widely quoted Florida case on this general subject is that of State *ex rel.*, Kurz v. Lee, 163 So. 859. In that case the Sup. Ct. stated:

> 'Appropriation' of money is the setting it apart officially, out of public revenue for special use or purpose, in such manner that executive officers of government will have authority to withdraw and use such money, and no more, for such object, and for no other.

The Sup. Ct. also discussed the reason there for the constitutional provision requiring an appropriation by the legislature and the underlying reason for this provision and its application, using this language:

> The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts. Such a provision secures to the Legislature (except where the Constitution controls to the contrary) the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government. Lainhart v. Catts, 73 Fla. 735, 75 So. 47. (Parenthetical matter added.)

The question of a continuing appropriation is eliminated in view of the fact that the question you have presented indicates that a continuing appropriation is not involved.

Looking now to the statutes to see if there is authority contained in any of them that would permit an agency to contract for its purchases beyond the legislative biennium, we find from the general appropriations bill (Ch. 282, F. S.) first that:

> No agency of the state government shall contract to spend or enter into any agreement to spend any moneys in excess of the amount appropriated to such agency unless specifically authorized by law . . .

and then §282.091, F. S., states:

> . . . and any contract or agreement in violation of this section shall be null and void.

We find also, in this same chapter, that provision has been made for certain funds in one legislative biennium to become committed to be spent in a subsequent biennium in the event that they have been contracted for or obligated if the procedures set forth in §282.081, F. S., are followed.

The conclusion must inevitably be drawn from the statutes and from the Lee case cited, *supra*, that a contract or obligation for funds may be made for current funds, that is to say, funds appropriated for a given biennium, and these funds may be committed to be spent in a subsequent biennium by and with the approval of the budget commission as provided in §282.081, F. S.; but to contract in one legislative biennium to spend funds in a subsequent legislative biennium when those funds have not yet been appropriated by the legislature constitutes the usurpation of the power of the legislature to perform its constitutional duty to make the appropriation. Not only would this be violative of the legislative prerogative, but also in the event that the funds to be spent in the subsequent biennium would exceed the current appropriation, the contract to spend such funds is null and void as provided by §282.091, F. S.

It is my opinion, therefore, in answer to the question which has been propounded that such a contract as you have specified that extends beyond the legislative biennium is legal only in the event that it calls for the expenditure of current funds, that is, funds of the current biennium, which may be paid in a subsequent biennium by following the procedures outlined in §282.081, F. S. In the event that the contract contemplates the expenditure of funds to be appropriated in the subsequent biennium, such a contract is void.

066-91—October 10, 1966

STATE AUDITING DEPARTMENT

AUTHORITY, POSTAUDIT OF QUASI-MUNICIPAL CORPORATION—NORTHEAST AREA SPECIAL FIRE CONTROL DISTRICT, SARASOTA COUNTY

To: Ernest Ellison, State Auditor, Tallahassee

QUESTION:

> **Does the state auditor have the authority and duty to post-audit the financial accounts and records of the northeast area special fire control district in view of the provisions of Ch. 21, F. S., and Ch. 65-2244, Laws of Florida?**

The said northeast area special fire control district in Sarasota county, was established by Ch. 65-2244, which is referred to in §1 of said chapter as a "special fire control district which shall become and be a public municipal corporation having the powers and duties" set out in said Ch. 65-2244, and especially §§4-11 thereof relating to the operation and administration of the said district.

This special fire control district appears to be a quasi-municipal corporation, under the laws of this state, sometimes referred to as quasi-public corporations, which may be defined as a public agency endowed with such attributes of a municipality as may be necessary in the performance of its limited objective. (62 C.J.S. 62, §1, note 13) Drainage, irrigation, public utility, sanitary, school, water and highway districts have usually been deemed to be quasi-municipal corporations (35A Words and Phrases, Perm. Ed., 481-484). See also 1 McQuillin, Municipal Corporations, 3d Ed. 466 and 467, §2.13 to the same effect; and Forbes Pioneer Boat Line v. Board of Commissioners of the Everglades Drainage District, 77 Fla. 742, 82 So. 346, text 350, cited with approval in Arundel Corporation v. Griffin, 89 Fla. 128, 103 So. 422, text 423.

The duties of the state auditing department include the duty "to make annual postaudits of the accounts and records of all state and county officers and all state and county boards, departments, commissions, institutions or other agencies . . ." We find nothing in Ch. 21, F. S., expressly requiring the audit of the books and records of incorporated municipal corporation records; neither do we find anything in above-mentioned Ch. 65-2244, requiring the audit of the books and records of the said fire control district by the state auditing department. Section 167.61, F. S., relating to the general powers of municipalities and their duties, provides that: ". . . the governor may authorize and direct the state auditor by himself, or by some competent person or persons appointed by him, to examine into the affairs of the financial department of any municipality within the state. And he shall direct the state auditor to make such examination whenever petitioned to do so by at least twenty per cent of the freeholder electors of any municipality." It is also provided in said §167.61, F. S., that: ". . . The expenses of any such examination shall be paid by said municipality."

We must conclude that the state auditing department has no authority and duty to postaudit the financial accounts and records of a quasi-municipal corporation in this state, unless and until directed to do so by the governor, under said §167.61, F. S., unless there be some express provision therefor in the statutes and laws of the state. This leads to the conclusion that the state auditor has no authority or duty to postaudit the financial accounts and records of the northeast area special fire control district, absent a directive from the governor to do so under said §167.61, F. S.

066-92—October 10, 1966

STATE FINANCIAL AFFAIRS

SPENDING PHILOSOPHY—INTERPRETATION OF §282.051(6), F. S.—CORPORATIONS AND PARTNERSHIPS

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Would the provisions of §282.051(6), F. S., 1965, preclude payment of compensation by a state agency or board to a corporation where an officer, employee or stockholder of said corporation is currently filling or performing the duties of a position, the salary of which has been specifically fixed or limited by law?

Section 282.051(6), F. S., as amended by Ch. 65-367, provides as follows:

> The provisions of subsection (3)(e) of this section shall not apply to an individual filling a position, *the salary of which has been specifically fixed, or limited, by law.* Unless specifically authorized by law, an individual filling or performing duties of a position, the salary of which has been specifically fixed, or limited by law, shall not receive compensation from more than one appropriation, nor in excess of the amount so fixed, or limited, by law, regardless of any additional duties performed by him in any capacity or position. (Emphasis supplied.)

Section 282.051(3), F. S., mentioned in subsection (6) above makes reference to certain situations necessitating and authorizing budget commission approval of compensation.

In AGO 066-8, Feb. 17, 1966, this office had occasion to construe the provisions of §282.051(6), F. S. We observed, in part, that:

> . . . the provisions of subsection (6) of §282.051, F. S., *would preclude a state agency from paying the salary* of an individual whom it employs *where such individual was also filling a position the salary of which has been specifically fixed* by constitution, line item appropriation, statute or general law. . . . (Emphasis supplied.)

In answer to whether the foregoing would preclude payment of compensation by a state agency to a partnership where a member of said partnership was also filling a position the salary of which was specifically fixed by law, it was further observed:

> . . . in view of the definition and nature of a partnership as generally outlined above by the text and case authorities, we are inclined to believe that §282.051(6), F. S., is applicable to the *individual members of partnerships.* In other words, *in dealing with the individual member since each shares in the profits.* Payments to a partnership as discussed above, would therefore be prohibited under subsection (6) where an individual member of the partnership is also filling a position the salary of which has been specifically fixed or limited by law. (Emphasis supplied.)

The characteristics of a corporation are materially different than those of a partnership:

> While a partnership may be regarded as a corporation for particular purposes, the two are essentially different conceptions. The principal distinction is that a corporation is a *legal entity* deriving its existence from the state, whereas a partnership is a creature of contract *without an entity apart from its members.* (18 C.J.S., Corporations, §11) (Emphasis supplied.)

The corporation is a legal entity or artificial person distinct from the officers, employees, stockholders or members who compose it. (18 C.J.S., §10, *supra*). The capacity to exist and act as a legal entity apart from its members is a distinctive feature. (See 9A Words and Phrases, p. 444) Ordinarily the members of a corporation are not agents for the incorporated body; the shareholders act through a board which they create and cannot bind the corporation by their individual action. However, each member of a partnership is an agent for the partnership with respect to all matters within the scope of the partnership business; the members of a partnership are individually liable for all debts.

Of particular significance in distinguishing between a corporation and a partnership is the interest in the profits. The profits of a corporation, until they are declared as dividends, are part of the corporation assets and do not belong to the stockholders individually. (18 C.J.S., Corporations, §459) On the other hand, in a true partnership there is a mutual interest in the profits; the partnership agreement presupposes that each partner shall share in the profits. As pointed out in AGO 066-8, in dealing with the partnership a state agency in reality is dealing with the individual member; however, in dealing with a corporation a state agency is essentially dealing with a legal entity separate and distinct from any of the persons associated with such corporation.

In discussing the application of §282.051(6), F. S., to officers or stockholders of corporations, some difficulty may arise with respect to "close corporations." A close corporation is defined in §608.0100(2), F. S., as meaning "a corporation for profit whose shares of stock are

not generally traded in the markets maintained by securities dealers . . ." The term "close corporation" is often used to distinguish and set apart the corporation with only a few shareholders from the "public issue" or publicly held corporation (O'Neal on Close Corporations, Vol. 1, §1.02).

A "close corporation" is simply a corporation which has relatively few shareholders. The stock of such corporation may be held in a few hands; it may be held and controlled by members of one family group or it may be owned or controlled by a single shareholder (O'Neal on Close Corporations, *supra*, §1.05). Under such circumstances and for these reasons "close corporations" have sometimes been said to be "functionally more closely related to the partnership than to the corporation" (O'Neal, *supra*, §1.02). However, notwithstanding the fact that the stock may be held even by an individual, the close corporation just as the publicly held corporation is generally viewed as a legal entity having in law an existence separate and apart from the shareholders; rights, duties and other legal relations arising out of a business are adjusted as though the corporation is a legal personality; and just as any other corporation, the close corporation holds property and enters into contracts, executes conveyances, conducts litigation in a capacity separate and distinct from its shareholders and is not bound by an agreement among all shareholders and directors to which it is not a part (O'Neal, *supra*, §1.09).

It is further noted, however, in O'Neal on Close Corporations, §1.09:

> In spite of general adherence in theory to the notion that a corporation—whether close or publicly held—is a legal entity, courts frequently disregard a corporation's separate personality. As has often been stated, the separate personality of a corporation (and apparently this holds true whether the corporation is close or publicly held) will be disregarded or 'pierced' whenever the corporate form is employed to evade an obligation, to circumvent a statute, to perpetrate a fraud or crime, or to gain an unjust advantage or commit an injustice. Undoubtedly the likelihood that a court will disregard a corporation's legal personality in a particular situation is considerably *greater if the corporation is close than if it is publicly held.* (Emphasis supplied.)

See also Fletcher's Cyclopedia of the Laws of Private Corporations, §41; Biscayne Realty v. Ostend Realty, 148 So. 561.

From the foregoing discussion it would seem to be necessary under certain circumstances to examine the structure and organization of the particular corporation to ascertain whether it is the mere alter ego of the particular person involved. The determination of this question, to wit: whether the corporation form is being employed to circumvent the statute, is a question which would seem to be one which can only be resolved with any degree of finality by a judicial declaration.

Assuming, therefore, that the corporation has not been used to circumvent a statute, we are inclined to believe that §282.051(6), F. S., would not be applicable to the officers, stockholders or employees of such corporations. Under these same circumstances, an individual filling a position the salary of which has been specifically fixed or limited by law would not be receiving compensation from more than one appropriation as contemplated by §282.051(6), F. S., in a case where the state agency retains and compensates a corporation in which such aforementioned individual is either an officer, employee or stockholder.

I do not hestitate to again observe that §282.051(6), F. S., is

not what is often referred to as "a conflict of interest" bill relating to the conduct of state officers or employees. In enacting §282.051(6), F. S., the legislature has evidenced its intent to provide certain limitations on appropriations and expenditures of state moneys.

Your question is answered in the negative.

066-93—October 12, 1966

PURCHASING COMMISSION

PURCHASE OF FOOD AND COMMODITIES FOR STATE INSTITUTIONS—VENDORS' LIST—NECESSITY FOR FOREIGN CORPORATIONS TO COMPLY WITH §613.01, F. S.

To: Al J. Day, Acting Director, State Purchasing Commission, Tallahassee

QUESTIONS:

Do foreign corporations have to comply with §613.01, F. S., in order:

1. To be placed on list of vendors from which to purchase food and commodities for state institutions?

2. To do business with or sell their products to state institutions?

You have, by your letter of Sept. 29, 1966, related certain facts to me which appear to be as follows. The purchasing commission, through its director and others, has been designated to purchase food and commodities for the various institutions under the board of commissioners of state institutions, and pursuant to this obligation has established a rather extensive vendor's list consisting largely of out-of-state suppliers. You have asked me to give you my opinion as to whether or not such out-of-state or foreign suppliers should be required to comply with §613.01, F. S.

I have assumed that by your reference to §613.01, F. S., you are concerned only with corporations. Section 613.01, F. S., has been in existence in its present form since 1915. At the time of its original enactment in 1907, it was a rather harsh statute where the owning or holding of property was concerned, but the 1915 amendment relaxed these harsh provisions so that now a corporation may at least hold title to property acquired by it without penalty.

This field of law is one that has been very widely considered and construed, not only by our own courts, but also by most of the courts of other states. We find that the basic law covering statutes of this kind has been set forth in Crockin v. Boston Store of Ft. Myers, 188 So. 853, to the effect that normally a single or an isolated business transaction does not constitute the doing of business contemplated under §613.01, F. S. However, if a single transaction or a series of isolated transactions form a part of the regular business of the corporation and the activity of the corporation in performing this single act or the series of isolated acts evidences intent or indicates a purpose to conduct or engage in business in the state, then for all practical purposes the corporation is truthfully and factually engaged in business in Florida pursuant to §613.01, F. S.

In 20 C.J.S., Corporations §1828, *et seq.*, we find a very comprehensive and enlightening detailed statement which is in accord with the principles laid down in Crockin, *supra*.

While the Florida courts have had occasion to determine whether

or not a corporation was doing business in Florida, I have been unable to find any place where the courts have held that the mere asking to be placed or being placed on a vendor's list as a possible supplier of commodities to a state institution constitutes doing business in the state. It is my opinion that if the furnishing of the commodities upon a proper bid being made results in the awarding of a contract for that purpose and the corporation supplying these commodities, then it would truthfully be engaging in business in Florida because it would be doing an act or a series of acts furthering its corporate purpose.

Consequently, while I am doubtful that you would have authority to require a foreign corporation to qualify under §613.01, F. S., merely to become a name on your vendor's list, I am of the opinion that a condition of any contract for the supplying of commodities to any of the state institutions for which you purchase might well be that the supplier thereof, if a corporation, either be a Florida corporation or a foreign corporation qualified pursuant to the provisions of §613.01, F. S.

066-94—October 12, 1966

PURCHASING COMMISSION

AUTHORITY OF THE COMMISSION RELATIVE TO ESTABLISHING COMPETITIVE BIDDING PRICES—AVAILABILITY TO COUNTIES AND MUNICIPALITIES

To: Al J. Day, Acting Director, State Purchasing Commission, Tallahassee

QUESTION:

Is there a conflict between provisions of subsections (2) and (3) of §287.051, F. S., relative to the commission's authority to make available to counties and municipalities competitive bid prices established for the state?

Leaving out the portions that are not applicable to this question, §287.051, F. S., provides as follows:

> The purchasing commission shall supervise the performance, . . . of the following duties:
>
> (2) . . . the negotiation and execution of purchasing agreements and contracts through and under which the commission may require state agencies to purchase, and the obtaining or establishment of methods for obtaining of competitive bid prices upon which any agency of the state may purchase, and, *where practicable,* upon which a county, municipal or other local public authority may purchase. (Emphasis supplied.)
>
> (3) The arrangement of provisions in purchase contracts of the state or any agency, providing that the same price for which a commodity is available to the state, shall also, during the period of time provided therein be available to any county, county board of public instruction, municipal or other local public agency or authority which may desire to purchase at the state contract price. . . .

Without doing more than stating the ultimate legal principle of statutory construction, our courts require, first, that the full intent of the legislature be determined, recognized, implemented and activated by the statute and its construction and, second, that in order to

perform this duty all statutes covering the same subject matter should be read and construed in *pari materia.*

With this principle in mind, we find upon analysis of the "where practicable" that the legislature intended this to mean if feasible, or that which may be performed or done or accomplished.

The commission has been directed, paraphrasing the statute, to obtain or establish methods for obtaining of competitive bid prices upon which any agency of the state may purchase and "if feasible or if possible or if it may be done" to obtain or establish methods for obtaining of competitive bid prices upon which a county, municipality or other local public authority may purchase. In subsection (3), the commission has as one of its duties: "the arrangement of provisions in purchase contracts . . ." to the effect that if this commodity price is available to the state it will likewise be available for that same period to any county or others that may desire to purchase at this same price.

In subsection (2) the commission is to arrange for competitive bid prices for the state and, where practicable, for the county, and in subsection (3) provisions are to be made in the contract for the same prices to be furnished to counties and others that are given to the state.

If, from your experience and the experience of the commission, it has been determined that it is feasible or practicable to arrange these competitive bid prices for both the state and the counties and others who wish to purchase at the price, and contract provisions may be made to this same effect, then it seems to me that you have adequately performed the legislative intent.

In view of the experience which I know you have had in establishing competitive bidding prices and the contract provisions making these prices available to the counties, I cannot see where any conflict now exists between the statutes when read in *pari materia* in accordance with the expressed intention of the legislature.

066-95—October 12, 1966

GOVERNOR

AUTHORITY TO ISSUE COMMISSIONS OF OFFICE—TERMS OF YEARS—§7, ART. XVI, STATE CONST.

To: Haydon Burns, Governor, Tallahassee

QUESTION:

> **May the governor issue a commission for a five-year term for an office created by the legislature and if not, what alternative does he have in relation to this office?**

You have advised me that the legislature of Florida in 1965 passed a bill which became Ch. 65-2431, Laws of Florida, a local act, by which the Citrus county port authority was created. The authority consists of 5 members to be appointed by the governor. By §2 of the act the terms of the members shall be 1 year, 2 years, 3 years, 4 years and 5 years.

The act cited above creates 5 offices, to be filled by appointment by the governor. The term of 1 of these offices is specified by the act to be for 5 years.

The State Const., in §7, Art. XVI, declares:

> The Legislature shall not create any office, the term of

which shall be longer than four years, except membership on the board charged with responsibility for colleges and universities (not including junior colleges) which terms may be extended by the legislature to not more than nine years.

On much the same question, the Sup. Ct., of Fla., made this statement, in State v. Hurlbert, Fla., 20 So.2d 693:

> It is always presumed that in the passage of legislation, a constitutional result is intended. And such presumption will be indulged in to uphold the validity of a statute, if such may be done without doing complete violence to the language used by the law making body.

In that case, the statute failed to fix the duration of the term of office created. The Sup. Ct. said:

> The statute will be construed as though it provided for a term of four years.

A situation similar to that of the Citrus county port authority developed in Volusia county, in which the Halifax hospital district was created by an act of the legislature, the terms of 2 of the members to be for six years each. The Sup. Ct. of Fla., in State *ex rel* Landis v. Green, 107 Fla. 335, 144 So. 681, ruled that so much of the act as provided for the term and appointment of commissioners for the district for 6 years was invalid and may be eliminated, but that such appointments might be validly made for terms of 4 years, as contemplated by §7, Art. XVI, of the State Const.

Likewise, in the appointment of the executive secretary of the Everglades national park commission, the Sup. Ct. of Fla. followed Landis v. Green, *supra*, above, in holding that while the act creating the office was silent on that point, the court would hold the appointment good for 4 years (State v. Lee, 132 Fla. 512, 181 So. 9).

Following the obvious reasoning of the Sup. Ct. of Fla. in Landis v. Green, you as governor may issue a commission stated for 5 years, but it would be valid only for 4 years. The better course, and one which was directed by the court in Landis v. Green, is to issue a commission for a term of 4 years in place of the office designated for 5 years. Thus you would commission 2 officers for terms of 4 years each, while the others would receive commissions for 1, 2 and 3 years respectively.

066-96—October 17, 1966

TRANSPORTATION OF SCHOOL CHILDREN

OPERATION BY PRIVATE ASSOCIATIONS OF SCHOOL BUSES FOR PUBLIC SCHOOL STUDENTS

To: Floyd T. Christian, Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May local unofficial associations such as parent-teacher associations and athletic and band booster associations operate school buses to transport children to or from the public schools or to school sponsored activities independently of the control and supervision of the county board of public instruction?

2. If unofficial school associations may operate school buses outside the supervision of the county board of public instruction:

a. Does the county board of public instruction have any responsibility relative to insurance protection and to what extent for such transported children?

b. Are the vehicles operated by such associations required to meet the color and identification requirements of Ch. 234, F. S.?

We find no prohibition against unofficial associations, such as parent-teacher associations and athletic and band booster associations, operating school buses to transport children to and from schools or to school sponsored activities. If, however, such organizations charged any consideration (even for the defraying of expenses) in transporting children to and from school sponsored activities, such groups would be required to comply with the provisions of Ch. 323, F. S., relating to certificates and permits for motor carriers. But, if the use of such buses was limited to the transporting of children to and from school, such activities would come within the purview of §323.29(1), F. S., which provides: ". . . there shall be exempted from the provisions of this chapter, and from commission jurisdiction and control, motor vehicles, other than those engaged in common carrier service, used exclusively in transporting children to and from schools; . . ."

Question 1 is answered in the affirmative.

Relative to question 2.a., we interpret §234.03, F. S., as requiring county school boards to secure insurance covering liability for damage on account of bodily injury or death to pupils legally enrolled in public schools by reason of the ownership, maintenance, operation or use of school buses. If the county board did not own, maintain, operate or use the school buses in question it would not be required to procure such insurance.

Section 234.03(5), F. S., affirms this conclusion by applying a penalty to members of any county board which owns or operates a school bus or other vehicle used for transporting pupils without procuring insurance. The actual owner or operator of such school buses would be required to procure such insurance and the failure of such owner or operator so to do would subject him to the criminal penalty of §234.03(5), F. S.

Question 2.a., is answered in the negative.

In response to question 2.b., your attention is called to the fact that §234.08, F. S., establishes color and identification requirements for school buses. Subsection (1) limits the definition of school buses to vehicles used for the transportation of pupils of the public schools, which vehicles are owned, operated, rented or leased by any county board. Although buses independently owned and operated by any local unofficial associations would, therefore, not come within this definition, they would, under the provisions of §234.07, F. S., be required to be constructed, maintained and operated in accordance with all requirements of law and regulations of the state board relating to school buses.

I construe §234.07, F. S., as an affirmative requirement that all vehicles used to transport 9 or more public school pupils at one time comply specifically with the provisions of §234.08, F. S., relative to specifications for school buses.

Question 2.b. is answered in the affirmative.

066-97—October 17, 1966

PERSONAL PROPERTY

DISPOSITION WHEN ABANDONED ON UNIVERSITY GROUNDS

To: W. G. Hendricks, Business Manager, Board of Regents, Tallahassee

QUESTION:

What disposition should be made of personal property abandoned on university and college grounds, under the supervision or jurisdiction of the board of regents, by students and others?

We gather from your request for opinion and the copies of letters and documents accompanying your request for opinion, that from time to time personal property is left or abandoned, by students and others, under circumstances and conditions indicating the abandonment of such properties by their owners. You request an opinion on the question of the disposition to be made of such properties.

The Sup. Ct. of the U. S., in Connecticut Mutual Life Ins. Co. v. Moore, 333 U. S. 541, text 548, 68 Sup. Ct. 682, 92 L. Ed. 863, text 870, remarked that: "The right of appropriation by the state of abandoned property has existed for centuries in the common law. See Anderson National Bank v. Luckett, 321 U. S. 233, text 240, 64 S. Ct. 599, 88 L. Ed. 692, text 701." In said Anderson National Bank v. Luckett, *supra*, the same court said that: "At common law, abandoned personal property was not subject to escheat, but was subject only to the right of appropriation by the sovereign as bona vacantia. A History of English Law, 2d Ed. 495, 496."

Present §705.01, F. S., prior to its amendment by Ch. 22031, 1943, provided that whenever "*any wrecked or derelict goods* shall be found in any county in this state" (Emphasis supplied.) the county judge shall proceed as provided for in said section and order the same sold by the sheriff, the proceeds of which are to be deposited in the state treasury. The former owner of such property may recover the proceeds of such sale if applied for within a year and a day. By amendment made by Ch. 22031, 1943, said §705.01, F. S., was extended so as to include also "abandoned motor vehicles or *other personal property.*" (Emphasis supplied.) The extension of the said section to "abandoned personal property" seems to make provision for the disposition of the abandoned personal property hereinabove discussed and considered.

We hold that when personal property is abandoned on university and college grounds, under the supervision and jurisdiction of the board of regents, including the buildings upon said grounds, such property is within the purview and intention of §705.01, *et seq.*, F. S., and should be disposed of as therein provided.

066-98—October 18, 1966

CRIMINAL PROCEDURE

ARREST BY GROUND STATIONED HIGHWAY PATROL FOR SPEEDING VIOLATION BASED ON INFORMATION TRANSMITTED BY AIRBORNE PATROL OPERATING CLOCKING DEVICES

To: Alan R. Williams, Pinellas County Prosecuting Attorney, Clearwater

QUESTION:

Is the misdemeanor offense of speeding committed in the

presence of a ground station trooper when aircrafts are used by the Florida highway patrol for the purpose of clocking the speeds of automobiles by means of a stop watch against previously established highway markings and the motorist is stopped as he approaches the trooper stationed on the ground, who sees the motorist in motion and is advised of the speed violation by troopers in the aircraft?

Section 317.221, F. S., prescribes the maximum speed limits upon highways and §317.701, F. S., makes the violation thereof a misdemeanor.

Section 901.15, F. S., provides in part that an arrest by an officer without warrant is lawful:

> (1) When the person to be arrested has committed a felony or misdemeanor or violation of a municipal ordinance in his presence. In the case of such arrest for a misdemeanor or violation of a municipal ordinance, the arrest shall be made immediately or on fresh pursuit.

The director and members of the Florida highway patrol are empowered under the provisions of §321.05, F. S., to make arrests without warrant for the violation of any state criminal law committed in their presence upon the right-of-way of any public road.

The simple and clear language of the foregoing provisions of our statutes places beyond doubt the proposition that a Florida highway trooper may arrest for a speeding violation only when such misdemeanor occurs in his presence. The only difficulty with this principle, as raised by your question, is the significance of the words "in his presence."

Malone v. Howell, 192 So. 224, a suit for damages for the death of plaintiff's husband, appears to be the basic Florida case on arrest without a warrant for a misdemeanor. At p. 226 the court said:

> An arrest without a warrant for a misdemeanor, to be lawful, can only be made where the offense was committed in the presence of the officer—that is it must have been within the presence or view of the officer in such manner as to be actually detected by the officer by the use of one of his senses.

The Florida court then cited with approval the language of a Texas case, Brown v. Wallis, 101 S.W. 1068, to the effect that:

> It is not sufficient that the officer is within seeing or hearing distance of the criminal act and thereby obtains knowledge of the fact, but he must also be able to 'detect it by sight or hearing as the act of the accused.'

The court also appears to have approved by implication the language of Garske v. United States, 1 F.2d 620 (8th Cir.), which is cited in the Brown v. Wallis decision, stating:

> The probable cause which will justify arrest for a misdemeanor without a warrant must be a judgment based on personal knowledge acquired at the time through the senses, or inferences properly to be drawn from the testimony of the senses. Mere suspicion is not enough to justify arrest without a warrant for a misdemeanor. . . .

In the early case of Roberson v. State, 28 So. 424, our Sup. Ct. disproved the suggestion that it was not necessary that the offense be committed in the presence of the officer making the arrest but merely in the presence of any officer.

In Carlton v. State, 58 So. 486, our court determined that an offense had been committed in the presence of the officer where a pistol

was fired within 100 yards of the officer's home. The officer did not see the actual firing, as the offender was standing behind a shed, but he heard the shot and immediately went to the spot where the shooting occurred. The court also cited with approval as an instance of sufficient presence a North Carolina case in which the defendant in the darkness struck his wife a blow with a stick in the public road. Although the officer did not see the actual assault, by reason of the darkness, he heard the sound of the blow and the cries of the woman.

More recently in Campbell v. Dade, 113 So.2d 708, the Dist. Ct. of App. of Fla., 3rd Dist., dealt with an arrest for violations of certain municipal ordinances without a warrant where the offenses were clearly committed not in the presence of the arresting officer. The court said that the legislature had seen fit to differentiate between the arrest of persons for misdemeanors and felonies, requiring as to the first that the offending act occur in the presence of the officer, while as to the second, by reason of the serious nature of the acts constituting felonies, an arrest might be made on probable cause.

Likewise in Waters v. Ray, 167 So.2d 326, the Dist. Ct. of App. of Fla., 1st Dist., placed its stamp of approval on the principle stated in Malone v. Howell, *supra*, by stating that:

> It is well settled that an arrest without a warrant for a misdemeanor to be lawful can only be made if the offense was committed in the presence of an officer—that is it must have been within the presence or view of the officer in such manner as to be actually detected by the officer by the use of one of his senses.

An exhaustive review of the decisions of other states indicates almost without exception that the principle enunciated in Malone v. Howell, *supra*, has received universal approval from the appellate tribunals of this country.

Reverting, therefore, to your question, it will be helpful to examine the facts which you present. It is presumed that the situation to which you refer entails aerial surveillance of a highway by Florida officers whereby the officers in a plane over the highway determine the speed of a vehicle below on the roadway and find a violation of the applicable speed laws. They then radio the information as to such excess speed to a "chase" trooper below, who, relying solely on such information of a violation received on his radio from above, stops the motorist and arrests him for the misdemeanor of speeding.

Presuming these facts, it is my opinion that the offense is not committed in the presence of the "chase" officer. This conclusion appears necessary, since it is clear that the officer on the ground, relying solely for knowledge of the violation on the hearsay information provided by his radio, did not detect the violation personally by the use of his senses, as required by Malone v. Howell and the other cases cited above.

It is of course true that his sense of hearing heard information that an offense was being committed, and it may be that with his sight he saw the vehicle which he was advised was at a certain moment exceeding the speed limit. However, the officer on the ground knows that an offense is in fact being committed only through the sense of another, and the communication of such knowledge to him by way of radio remains hearsay. Although in such instance the officer might arrest as to a felony violation, for which only probable cause is necessary, it is clear to me that he may not under such circumstance arrest for an offense that is merely a misdemeanor.

An extensive review of the cases dealing with various radar and other electronic devices used for detecting speed violations indicates that,

although such modern instruments for the perception of speed are now accepted by the courts without proof of their underlying scientific principle, no decision can be found (with one exception discussed below) where the court ruled on the legality of an arrest for a misdemeanor without a warrant made by an officer who has mere radio knowledge of the violation and had not witnessed it with his own senses. The annotation on such radar devices, and other devices, at 49 A.L.R.2d 469 advises that no case had been found on this facet of law, nor do the supplements thereto reveal any decision.

In City of East Cleveland v. Ferrell, 154 N.E.2d 630, the Sup. Ct. of Ohio, after approving the use of a radar device, points out that the above phase of the operation still presents a problem. The court said:

> An equally interesting question is raised by the normal method of arrest under the radar speed meter procedure in the light of Section 2935.03, Revised Code, which authorizes a police officer to make an arrest without a warrant of a person *found violating* a law of this state, inasmuch as the officer in the police car ahead, who apprehends the driver, relies only upon information radioed to him by the officer in the radar car. (Emphasis supplied.)

The Ohio court did not rule on this problem as it was not presented in the case.

It is interesting to note that the Commonwealth of Virginia in §46-215.2, Virginia Code, makes special provision for the validity of such arrests by providing that where the speed of a vehicle is determined by the use of radio microwaves or other electrical devices the results of such a check afford in court prima facie evidence of the speed of the vehicle involved. Dooley v. Commonwealth, 92 S.E.2d 348.

It is likewise significant that our own legislature in introducing modern, mechanical and electronic speed detection into our statutes by virtue of §317.234, F. S., in addition to providing for rather elaborate warning precautions, requires in subsection (3), that the accused violator be "lawfully arrested under the laws of this state." The proviso is also added that nothing in the section relieves the prosecution of establishing beyond a reasonable doubt all facts essential to show the guilt of the accused person for the offense for which he is charged.

The only decision that my research discloses dealing specifically with an arrest made without a warrant for the misdemeanor of speeding by an officer relying on information relayed by radio from a patrol plane is that of State v. Cook, 399 P.2d 835, in which the Kansas court upheld such arrest as being within the presence of the arresting officer. This decision to date appears to stand alone amid the jurisprudence of this country.

A reading of this decision shows that the Kansas court justified the arrest largely by an appeal to the need for modern, effective law enforcement. In rather colorful language it details the mobility of the motorist, his craving for speed and the necessity of using modern scientific techniques of detection and apprehension.

However, it does not appear to me that I may base my opinion on this case as a precedent that would be necessarily accepted by our Florida courts. Indeed the clear language of Malone v. Howell, the other cases cited and the language used by our legislature in §317.234, F. S., requiring a legal arrest "under the laws of this state," convince me that our appellate courts would have great difficulty in adopting the ruling in the Kansas case.

I wish to point out, however, that in these instances where there

is aerial or radar surveillance it still remains possible for the trooper on the ground to make an effective arrest when he with his own senses and by reason of experience and familiarity with the speed of vehicles on a given highway can judge directly that an oncoming or nearby motorist is in fact exceeding the speed limit. The sufficiency of his vantage point and the reliability of his observation will of course be a matter for the court to weigh and decide. In all such situations the independent observations of the officer, if found adequate under the rules relating to evidence of speed, will be sufficient to protect the arrest from illegality. People v. Duskin, 174 N.Y.S.2d 527. The testimony of a companion officer in a plane or at a ground radar device will then be acceptable in court as to his detection of the speed of the offending motorist.

We all recognize the need for new and improved scientific methods of crime detection and apprehension to meet the increasing antisocial and illegal activities of those of our people who base their conduct solely upon their skill in avoiding discovery. With the great carnage on our highways, resulting all too often from a failure of our motorists to observe the dictates of common sense as to speed and operation of their vehicles, no reasonable man can deny that we are in need of laws that will place effective techniques and scientific instruments in the hands of our law enforcement officers to moderate with police power the folly of those who so use our highways without regard for their own safety or that of others.

Nevertheless, as the Washington court noted in Plancich v. Williamson, 357 P.2d 693, we are faced with somewhat of a legal dilemma. As the court stated:

> A case of arrest without a warrant necessitates striking a balance as to (a) consideration respecting the rights of the individual citizen taken into custody, and (b) consideration respecting the responsibility of police officers for the safety and security of all members of the community. . . .

It is my belief that our legislature might fully obviate the difficulty which is made clear by your question by adding further legislation to encourage the effective and full use of aerial surveillance in conjunction with the provisions of §317.234, F. S., with suitable cautionary safeguards, and then make detection of excess speeds by all such devices prima facie evidence in court of the speed of the offending vehicle.

However, until this is done, it is my opinion that a "chase" officer on the ground who does not detect the misdemeanor of speed directly with his own senses cannot legally arrest an offending motorist where his only information as to the violation is received from another, as from a fellow officer operating a speed detection device not in the presence of the arresting officer. This conclusion applies only to a situation in which the arresting officer is relying solely on hearsay. Where the arresting officer has the detection device in his own car or independently of any such electronic aids is able to judge effectively and sufficiently that a violation of the speed laws has occurred by the use of his own senses in some type of direct detection there would appear to be no doubt that such an arrest would be legal.

My research discloses that the state of California since 1959 has used aerial surveillance as a technique for determining speed violations. The Hastings Law Journal, Vol. 14, No. 4, 427-435 (1963). In California the officer in the plane apparently determines the speed of the motorist below, radios this information to a companion on the ground, who stops the motorist. The motorist is then placed in radio contact with the officer in the plane and is advised of the determina-

tion as to excess speed. If under such circumstances the motorist were to admit his violation, it is apparent that the ground officer might lawfully arrest on the basis of the admission. In the event there is no admission, it would seem that the officer in the plane would then either have to land the plane and make the arrest or with reasonable promptness obtain a warrant charging the offense.

It is not my intention to rule on the legality of an arrest under such circumstances. However, it is evident that techniques can be developed that would simplify the use of planes in patrolling our highways and still permit effective arrests for the misdemeanor of speeding.

A final footnote appears relevant. The fact that an arrest is illegal does not affect the jurisdiction of the court to try the offender. Campbell v. Dade, Fla., 113 So.2d 708; Jones v. State, Fla., 123 So.2d 385; 5 Am. Jur. 2d Arrests, §116; 22 C.J.S., Criminal Law, §144.

066-99—October 21, 1966

COUNTY PUBLIC SCHOOLS

EXCEPTIONAL CHILDREN—REQUIRED EDUCATIONAL PROGRAMS

To: Floyd T. Christian, Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Does existing law require a county board of public instruction to provide education for the mentally retarded and all other types of exceptional children?

2. What is the meaning of "insofar as practicable" as used in §230.23(6)(e), F. S.

3. What is the meaning of "educable" as used in §236.04(4), F. S.?

4. If exceptional child education is mandatory for the county boards and the legislature fails to authorize a sufficient number of exceptional education child units to meet the needs of the several counties of the state, is it mandatory that a county board offer exceptional child education in the absence of authorized minimum foundation program funds to assist in sustaining such exceptional child educational programs?

The basic statutory provision authorizing the establishment of facilities and programs for the education of exceptional children is contained in §230.23(6)(e), F. S., which places upon the several county boards of public instruction the duty to provide, insofar as practicable, for special facilities for classes for backward, defective, truant, or incorrigible children of school age and for children with unusual ability. Also, to provide facilities in the way of day, part-time or night schools or classes for adolescents and adults, including illiterates and groups needing Americanization and, when desirable and practicable, provide for the education of children below the first grade level in nursery school or kindergarten classes.

The providing of educational facilities for exceptional children is, therefore, not absolutely mandatory upon the several boards of public instruction, but they are required to provide such facilities and training "insofar as practicable." Subject to this limitation, question 1 is answered in the negative.

The word "practicable" has been variously defined by courts

throughout the United States. It appears, however, that most courts in defining this word as used in the manner of our statute hold its meaning to be the same as "possible" or "feasible."

The use of the phrase "insofar as practicable" in §230.23(6)(e), F. S., places upon the several county boards of public instruction the duty of providing for the education of exceptional children when, but only when, it is possible or feasible to do so. In determining the possibility or feasibility, each county board of public instruction should take into consideration such factors as the need within the county for the furnishing of such education, the cost thereof, the availability of funds therefor and whether the initiation of such a program within the county would, as the result of limited financial resources, cause other educational programs to suffer to the detriment of a larger segment of the population.

A determination of whether such a program was "practicable" would be a matter of exercise of discretion by the several county boards of public instruction, subject, of course, to review by the courts to determine if there had been an abuse of discretion.

The word "educable" as used in the phrase "educable child" in §236.04(4), F. S., has been defined by §130-6.31(2), State Board of Education Regulations, as follows:

> Educable child shall mean a child capable of learning to a degree which exceeds mere repetition and shall include those who may be expected to benefit from special educational facilities and methods designed to make them socially adjusted and economically useful and shall exclude those unable to profit by or adjust to the offerings of such an educational program.

I believe that the answer to question 4 is contained in the answers to questions 1 and 2 above.

066-100—November 2, 1966

PUBLIC SCHOOLS

LIABILITY INSURANCE ON SCHOOL BUSES—LIMITATION ON AMOUNT

To: Floyd T. Christian, Superintendent of Public Instruction, Tallahassee

QUESTION:

> **Does §455.06, F. S., authorize a county board of public instruction to carry liability insurance covering pupils on a school bus in a larger amount than $5,000 times the rated seating capacity of the bus as prescribed in §234.03(1), F. S.?**

Section 455.06, F. S., has existed in substantially its present form since its enactment by the 1953 session of the legislature.

Prior to 1953, and until amended in 1963, §234.03(1), F. S., required county school boards to secure insurance covering liability for damage on account of bodily injury or death to pupils enrolled in the public schools by reason of the ownership, maintenance, operation or use of school buses. Prior to 1963 that section contained no limitation as to the amount of liability insurance to be carried by the school board.

By virtue of the provisions of §16, Ch. 63-376, the legislature established that such liability insurance shall be carried in the sum of $10,000 for bodily injury, or death resulting therefrom, to any one pupil, and shall, for any one accident, be limited to $5,000 multiplied by the rated seating capacity of the bus or vehicle.

When the legislature enacted Ch. 63-376, it established a limit on the amount of insurance to be carried by amending a section of the statute which previously required the carrying of such insurance, but contained no limitation as to the amount thereof.

At the time of the 1963 amendment to §234.03(1), F. S., §455.06, F. S., was in effect and the legislature is presumed to have known of its existence.

The effect of the aforesaid 1963 amendment was to establish fixed amounts of insurance as stated therein and the preexisting §455.06, F. S., cannot be construed as authorizing the county board to carry such insurance in amounts in excess of that prescribed by §234.03(1), F. S.

Your question is answered in the negative.

066-101—November 2, 1966

RETIREMENT

STATE AND COUNTY OFFICERS AND EMPLOYEES—CONSTRUCTION OF §122.02(1), F. S., DEFINING TERM IN APPLICATION TO MOSQUITO CONTROL DISTRICTS, FIRE CONTROL DISTRICTS OF PALM BEACH AND ORANGE COUNTIES AND TAMPA SPORTS AUTHORITY

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

Are employees of the following districts and authority within the purview of Ch. 122, F. S.?

1. The Amelia Island mosquito control district, probably established under general law providing for the establishment of such districts.

2. The Tampa sports authority, established by Ch. 65-2307.

3. Fire control districts established in Palm Beach county, under the authority of Ch. 63-1747.

4. Fire control districts established in Orange county under the authority of Chs. 27789, 1951, 31065, 1955, 59-1652, 61-2590 and 65-2012, Laws of Florida.

AS TO QUESTION 1:

We find no statute specifically establishing and incorporating the Amelia Island mosquito control district in Nassau county; however, we do find Chs. 31028, 1955, and 59-1599, recognizing the said district and fixing the compensation of its governing board. It seems evident that the said district was organized and established under the general mosquito control district statutes of the state, if prior to the effective date of Ch. 59-195, then under either Chs. 388, 389 or 390, F. S., but if after said date then under Ch. 388, F. S. Section 122.02(1), F. S., defines "state and county officers and employees" within the purview and intention of Ch. 122, F. S., as including "mosquito control districts of a county or counties." This inclusion of mosquito control districts in the state and county officers and employees retirement system was by §2, Ch. 29801, 1955, which act consolidated the state retirement system and the county retirement system into a consolidated state and county retirement system. This revision and amendment clearly included the Amelia Island mosquito control district and brought its officers and employees within the state and county officers and employees retirement system, and they should participate therein.

AS TO QUESTION 2:

The Tampa sports authority was created and established by Ch. 65-2307, which chapter declares it to be a "public agency politic and corporate, for the purpose of planning, developing and maintaining a comprehensive complex of sports and recreation facilities for the use and enjoyment of the citizens of Tampa and Hillsborough county." (§1 of said Ch. 65-2307.) The said authority consists of 11 members, of which 8 are individuals, and 3 ex officio members, consisting of the mayor of Tampa, a member of the city council of Tampa, to be designated by the said council, and a member of the board of county commissioners, to be designated by that board. The fact that the legislature named specifically the 8 individual members of the authority, instead of their being elected by the people or being appointed by the governor, is a clear indication that the legislature deemed them neither state nor county officers. (§27, Art. III, State Const.) The Tampa sports authority appears to be a public corporation. The officers and employees of this public corporation do not appear to be "state and county officers and employees" within the definition thereof found in §122.02(1), F. S., and should not be so considered.

AS TO QUESTION 3:

Chapter 63-1747, authorized the establishment and maintenance of fire control tax districts in Palm Beach county, which districts are declared to be for a public purpose and benefit. (§1, Ch. 63-1747.) The board of county commissioners of Palm Beach county "is authorized and empowered to create, establish and abolish fire control districts and fix the boundaries thereof . . ." (§2, Ch. 63-1747). These fire control tax districts do not become operative until after the holding of a public hearing, in the manner required by the said act of 1963. The business and affairs of the "fire control tax districts" are conducted and administered by a board of 3 supervisors, appointed by the governor, which supervisors are empowered to employ a fire chief, fire warden, deputy fire wardens and other personnel and employees and fix their compensation. (§§3-5, Ch. 63-1747.) Under §6, Ch. 63-1747, the fire control commission (board of supervisors) of each district are required to adopt and submit to the board of county commissioners for their approval a fire control district tax budget. When the fire district budget has been prepared and approved the board of county commissioners is required to cause to be levied a sufficient tax, not to exceed 2 mills, on all real and personal property within the fire control tax district to raise such budget "and such taxes shall be included in the taxes assessed on the regular county tax roll." These tax funds are turned over to the proper fire control tax district for the purpose of financing the operation of the said fire district.

These fire control tax districts are special taxing districts so that their officers and employees are neither state nor county officers or employees, and its officers and employees are not paid for services rendered "from state or county funds, or from funds of drainage districts or mosquito control districts of a county or counties, or from funds of the state board of administration or from funds of closed bank receivership accounts or from funds of any state institution or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state for services rendered . . ." The funds of the fire control district, being in the nature of quasi-municipal corporation funds, the employees are not within the said definition of state and county officers and employees, and therefore not members of the state and county officers and employees retirement system.

AS TO QUESTION 4:

Fire control districts have existed in Orange county, since around 1949, under Chs. 26460, 1949, 27789, 1951, 31065, 1955, 59-1652, 59-1656, 61-2590 and 65-2012. Chapter 26460, 1949, was expressly repealed by §10, Ch. 59-1652 and §10, Ch. 61-2590. It appears from the title to Ch. 61-2590, that it revised and amended Ch. 51-27789, relating to fire control districts in Orange county. An examination of Ch. 27789, 1951, with Ch. 26460, 1949, indicates that the 1951 act was a general revision of the said 1949 act, which it replaced. Chapter 31065, 1955, amended §2 of said Ch. 27789, 1951. Chapter 59-1652, appears to have been a general revision of the then existing statutes relative to fire control districts in Orange county. Chapter 61-2590, appears to have been a general revision and amendment of the then existing statutes relative to fire control districts in Orange county. Chapter 65-2012, amended certain portions of said Ch. 61-2590, so that the applicable statutory law governing fire control districts in Orange county appears to be said Ch. 61-2590, as amended by Ch. 65-2012.

Said Ch. 61-2590, makes provision for the establishment and maintenance of fire districts in Orange county outside of municipalities having fire departments. These fire districts are organized and established in the manner set out in said Ch. 61-2590, as amended by Ch. 65-2012. First a petition is filed with the board of county commissioners for the establishment of the fire district described in the petition, which is established pursuant to an election. After organization the board of county commissioners appoints the first commission of the district (this is not in accordance with §27, Art. III of the State Const.), which indicates that the district officers are neither state nor county officers. The district, after adopting its budget, files the same with the board of county commissioners of the county "who shall cause to be levied a *sufficient tax* not to exceed 3 mills . . ." This is a district tax and not a county tax. (Emphasis supplied.)

There is little, if any, real distinction between the Orange county fire control districts and the Palm Beach county fire districts. The ruling on the Palm Beach fire districts is applicable here and should be applied to the said Orange county fire districts.

If the legislature had intended that either of these fire control districts or the Tampa sports authority were to be included within the purview of Ch. 122, F. S., it could easily have done so by specifically so providing as it has done so by providing for drainage districts and mosquito control districts. The legislative silence is ominous. Therefore, until the legislature provides otherwise by specific amendment we must presume that the legislature did not intend that the employees of the fire control districts or the Tampa sports authority be included within the purview of Ch. 122, F. S., and more specifically within the definition found in §122.02(1), F. S. Inclusion of these would be a matter of legislative concern.

Only the Amelia Island mosquito control district appears to be within the purview and operation of Ch. 122, F. S. See also AGO's 056-50, 056-157 and 058-256.

066-102—November 3, 1966

PURCHASING COMMISSION

SEALED ENVELOPES CONTAINING ONLY "NO BID" NOTATION—COMPLIANCE WITH COMPETITIVE BID LAW

To: Al J. Day, Acting Director, State Purchasing Commission, Tallahassee

QUESTION:

Upon a proper call for bids, where several sealed envelopes purporting to contain bids are received, but where, upon opening, there appears only one valid bid with all others bearing only the notation "no bid," have the requirements of the competitive bid statutes been met?

You have the additional problem from the practical aspect, in that the actual bidder in the situation outlined above complains, when he is not awarded the contract, that there was a valid advertisement and a valid competitive bid submitted on the one hand and, on the other hand, that his price has now been disclosed and that he is placed at a distinct disadvantage for this reason.

It has been very aptly stated in the texts that the purposes of competitive bidding statutes are to secure economy in the expenditure of public funds for materials and supplies needed by public bodies; to protect the public from collusive contracts; to prevent favoritism, fraud, extravagance and improvidence in the procurement of these things for the use of the public body; and to promote actual honest and effective competition to the end that each proposal or bid received and considered may be in competition with all other bids upon the same basis so that all such public contracts may be secured at the lowest cost to taxpayers. 43 Am. Jur. Public Works and Contracts, §26, p. 767; Wester v. Delote, 103 Fla. 976, 138 So. 721; and Hotel China and Glassware Co. v. Board of Public Instruction, 130 So.2d 78.

It is also very well settled that any and all agreements which, in their necessary operation upon the action of persons bidding on public contracts, tend to restrain the natural rivalry in competition of the parties and thus produce a result disadvantageous to the public are against public policy and therefore void. 43 Am. Jur. Public Works and Contracts, §33, p. 773.

With these principles in mind, it occurs to me that when a proper call for bids has been made and several potential vendors or contractors answer the call, that the basic intent of the statute has been complied with when several vendors or contractors answer the call by submitting what the commission believes to be a group of legitimate bids. However, when it ultimately appears that only one of the supposed bids is a valid bid, then the question arises: has there been collusion and is there an agreement among the bidders tending to lessen the actual competition?

The one answer appears to be in an appraisal by the commission of the factual situation. If the articles to be supplied are in common use and are commonly readily available among the several suppliers at competitive prices, then it is reasonable to assume that either there is collusion by agreement or otherwise, or that there are some factors unknown to you which have caused prospective bidders to refrain from submitting a valid bid. Contrary evidence may also be present such as, for example, if the one valid bid received is a bid for the supply of the materials that is

actually at a validly competitive price, the presumption may well be that there was no collusion or agreement with bidders.

From this discussion then, we arrive at the conclusion that the commission, upon the receipt of such bids, has itself complied with the law relating to a valid call for competitive bids, but must thereafter make a judgment decision, based on the facts that then exist, as to whether or not there was fraud or collusion or whether or not there may have been facts or circumstances that cause all others but one to submit a "no bid." Specifically answering your question, it is my opinion that the provisions for competitive bidding have been complied with, and regardless of the disclosure of the bid of the one person submitting a valid bid, the commission has the power and the authority and the duty to reject all bids and to readvertise if there are facts and circumstances leading the commission to believe that there has been fraud or collusion tending to stifle competition. This calls for the exercise of judgment and discretion on the part of the commission.

066-103—November 10, 1966

COURTS

SMALL CLAIMS—AUTHORITY TO ENTERTAIN PROCEEDINGS SUPPLEMENTARY TO EXECUTION

To: Robert B. McGregor, Judge Small Claims Court, Melbourne

QUESTION:

> **Is the judge of a small claims court created and operating under the provisions of Ch. 42, F. S., empowered to entertain proceedings supplementary to execution under §§55.52-55.611, F. S.?**

Proceedings supplementary are considered a substitute for a creditor's bill in chancery. It provides a judgment creditor with a remedy at law to discover assets which may be applied to the satisfaction of his judgment and to subject them to a speedy proceeding in the same court in which the judgment was rendered thereby eliminating the necessity for an independent suit. In order to afford the judgment creditor the most complete relief possible a liberal construction should be given the statutes regulating proceedings supplementary. See Richard v. McNair, 164 So. 836; Ryan's Furniture Exchange v. McNair, 162 So. 483.

In the case of South Florida Trust Co. v. Miami Coliseum Corp., 133 So. 334, the court said at p. 337:

> It seems also to be well settled that vesting the law courts by statute with the power to compel discovery of assets is not violative of that section of the Constitution providing that the circuit courts shall have exclusive original jurisdiction in equity, as the powers of such courts of law may be appropriately supplemented and added to in order to effectuate their judgments, otherwise the courts might become helpless; and it may be truly said, an examination of a judgment debtor is merely a matter of procedure not necessarily involving any equitable rights as such.

In Brownstone, Inc. v. Miami National Bank, 165 So.2d 262, the defendant contended that the civil court of record was without jurisdiction and authority to appoint a commissioner in supplementary proceedings. In support of his contention the defendant cited Ryan's Furniture Exchange v. McNair, 162 So. 483, 487, wherein the court said:

> Chapter 7842, Acts 1919 (§§4540 to 4549 C.G.L.) [§§55.52 to 55.61, Fla. Stat.] were intended to give the circuit court broad

> discretionary powers to carry out the full intent and purpose of the proceedings supplementary to execution law which was to confer on circuit courts the right to subject any and all property, or property rights of any defendant in execution, however fraudulently conveyed, covered up, or concealed, the same might be, whether in the name or possession of third parties or not, to the satisfaction of an execution outstanding against him.

However, in discounting the defendant's contention the court in Brownstone, *supra*, said that: ". . . *we discern no intention on the part of the court to hold that such authority was limited to the circuit courts.*" (Emphasis supplied.) and at p. 264 said:

> The civil courts of record were created by the legislature to relieve the overburden of the circuit courts of certain of their jurisdiction in actions at law. Each has the same power and authority over such actions as come within their respective jurisdictions.
>
> It would defeat this legislative intent for a litigant to be required to enforce a civil court of record judgment in the circuit court.

In Blackwelder v. D'Ercole Enterprises, Inc., 126 So.2d 598, the court held that a civil court of record had no jurisdiction in supplementary proceedings to hold a deed void and its judgment was therefore without legal effect. The court's decision appears to be based primarily upon §6, Art. V, State Const., which expressly provides:

> *The circuit courts shall have exclusive original jurisdiction in all cases in equity* except such equity jurisdiction as may be conferred on juvenile courts, *in all cases at law not cognizable by subordinate courts,* in all cases involving the legality of any tax, assessment, or toll, in the action of ejectment, *in all actions involving the titles or boundaries* of real estate, . . . (Emphasis supplied.)

The court further stated at p. 600 that:

> The powers granted to courts upon proceedings supplementary to execution unsatisfied by Section 55.55, Fla. Stat., F.S.A., may not diminish the constitutional powers granted exclusively to the circuit courts.

Therefore, based upon the aforesaid constitutional provision, statutes and decisions, it appears that the judges of the small claims courts, created and operating under the provisions of Ch. 42, F. S., are empowered to entertain proceedings supplementary to its execution, as provided for in §§55.52-55.611, F. S. However, all actions that may be taken pursuant to the provisions of §§55.52-55.611, F. S., involving equitable matters, titles and boundaries of real estate are exclusively matters within the circuit courts jurisdiction.

All attorney general opinions in conflict with the views and holdings herein are overruled.

066-104—November 10, 1966

UNIFORM COMMERCIAL CODE

SECURED TRANSACTIONS ENTERED INTO PRIOR TO EFFECTIVE DATE OF CODE GOVERNED BY REPEALED LAW

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

May the office of the secretary of state, subsequent to the

effective date of the Uniform Commercial Code, continue to receive certificates of renewal or continuance pursuant to the provisions of Chs. 524 and 673, F. S.?

Section 680.10-101(2), F. S., reads:

> Transactions validly entered into before the effective date specified in this section and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this code as though such repeal or amendment had not occurred.

This is subsection (2) of §10-102 of the 1962 official text of the Uniform Commercial Code as promulgated by the American law institute and the national conference of commissioners on uniform state laws. A great majority of the states that have now adopted the code have likewise enacted this section without substantial change. It is the mode of transition usually employed upon the enactment of a new statute—namely, that the rights and obligations flowing from a transaction entered into prior to its enactment (or, in this case, prior to its effective date) will be determined by prior law.

However, despite the fact that several states have been operating for as long as a decade under the code, apparently there have been few decisions on the particular section. In Pennsylvania, the first state to enact the code, a question involving a contract of sale entered into subsequent to enactment of the code but prior to its effective date was determined by the uniform sales act and decisions thereunder, rather than the code. Paramount Paper Products Co. v. Lynch, 182 Pa. Super., 504, 128 A.2d 157 (1956). In Massachusetts and New Jersey as well as in Pennsylvania it has been judicially determined that rights and obligations as to commercial paper executed prior to the effective date of the code were governed by the preexisting negotiable instruments law. Darkin v. Siegel, 165 N.E.2d 81, 340 Mass. 445 (1960); James Talcott, Inc. v. Shulman, N. J. Super., 198 A.2d 98 (1964); Paramount Paper Products Co. v. Lynch, *supra*.

None of the above-cited decisions are concerned directly with the precise point raised by your question. They do, however, emphasize the already clear and unequivocal language of the statute: "Transactions validly entered into before the effective date (of the code) . . . may be terminated, completed, consummated or enforced as required or permitted . . ." by the law under which they were begun.

It seems clear, therefore, that notwithstanding the specific repeal of the several chapters and sections of the Florida law enumerated in §680.10-102, F. S., a secured transaction effected prior to Jan. 1, 1967, will be governed by the repealed law under which it was effected as if such law had not been repealed.

If a secured party in a transaction effected prior to Jan. 1, 1967, elects to pursue his "rights, duties and interests" under precode law rather than to avail himself of the protective features of the code, and submits certificates of renewal or continuance pursuant to the provisions of former Chs. 524 and 673, F. S., (or any other pertinent repealed act) the office of the secretary of state will have no alternative to accepting them for filing.

066-105—November 14, 1966

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT

BUDGETED DISTRICT FUNDS—ADVANCEMENT FOR TRAVEL EXPENSES, VACATION—TRANSFER OF FUNDS FROM ONE OBJECT CLASSIFICATION TO ANOTHER

To: Ernest Ellison, State Auditor, Tallahassee

QUESTIONS:

1. May funds of the central and southern Florida flood control district be disbursed to one of its employees as an amount paid not in reimbursement of travel but rather in advance of the commencement of and in contemplation of such travel yet to be performed by him on behalf of the district, if such amount then paid does not exceed the amount (dollar value) of earned or accrued annual leave then on record to the credit of such employee, where such employee does not terminate his employment at the time of such payment?

2. If a person employed by the district on a biweekly payroll period basis commences his vacation on a certain day prior to the end of the then current period and on said day has to his credit unused earned or accrued annual leave at least equal in amount (dollar value) to the pro rata amount of his compensation for the remainder of that period computed from said day, may such employee be paid on said day from district funds an amount of salary equal to his regular compensation for the whole of such period, where such employee does not on said day terminate his employment with the district?

3. After the adoption of the final budget of the district pursuant to §378.28, F. S., may the governing board of the district subsequently make transfers from certain object classifications and purposes to other object classifications and purposes, without first providing notice and hearing for the benefit of owners who are subject to district taxes, in the same manner as is required by §378.28, F. S., for the adoption of the original, final budget?

The central and southern Florida flood control district was created and established by Ch. 25214, Laws of Florida, 1949, (Ch. 25270, 1949, is an identical duplicate of said Ch. 25214, having originated as an identical companion bill introduced in the House of Representatives) designed to make effective in the territory described in §2 of said Ch. 25214, the rules, regulations and provisions of Ch. 25209, 1949, now appearing, with amendments, additions and extensions, as Ch. 378, F. S. The purposes of said Chs. 25214 and 25270, 1949, were to establish the said flood control district without having to resort to the procedures provided for in §§8-12 in said chapters, and thereby bypassing said sections. The provisions of Ch. 378, F. S., except those sections providing for the procedures for the establishment of flood control districts, are applicable to the said central and southern Florida flood control district.

We find no provisions in either Ch. 378, F. S., Chs. 25214 or 25270, 1949, nor in the amendments, additions or extensions thereof, providing per diem or travel expenses for the officers and employees of the said central and southern Florida flood control district, or for the advance of per diem and travel expenses to officers or employees. The officers and

employees of the central and southern Florida flood control district appear to be within the purview and intention of §112.061, F. S. (said §112.061(2)(a)-(d), F. S.), so as to be governed by said provisions when traveling on state or district business. In the absence of other applicable express constitutional or statutory provisions elsewhere in the statutes and laws of Florida, fixing per diem and travel expenses for the officers and employees of the said central and southern Florida flood control district, said §112.061, F. S., appears to be the applicable law governing the question. We find no authority in said §112.061, F. S., authorizing the advancement of funds to officers or employees for their travel and per diem expenses prior to the performance of the duties required of them.

It appears from §112.061(5),(6), F. S., that they contemplate the reimbursement of travel expenses and per diem expenses, and contemplate the making of an application therefor after the services in connection with such travel have been performed. We find nothing in applicable statutes authorizing the advancement of travel expenses and per diem by the employing agency or officer; the statutes clearly contemplate a reimbursement of such costs and expenses, and not an advance of funds with which they may be paid. The appropriation under said §112.061, F. S., appears to be for the purpose of reimbursement of expenses incurred and paid, not the advancement of funds for the purpose of paying said expenses as they are incurred. Such an advancement of funds with which such expenses may be paid would, in legal effect, be the making of a loan or pledge of such funds to an individual or individuals in violation of §10, Art. IX, State Const.

Vacation for a state, county or district officer or employee has been said to be a temporary status, a respite or time of respite from active duty, a recess or leave of absence, a period of time when activity or work is suspended; the term "vacation" when used concerning state and local employment contemplates a rest period or time when work is suspended for a time, but pay continues in accordance with statute, contract, or employment practice. It is not intended as additional compensation, but as a vacation from employment with pay. A vacation implies a recess or leave of absence, a respite or time of respite from active duty, an intermission or rest period during which activity or work is suspended; a gain to the employer through a recuperated and better satisfied employee. (43 Words and Phrases, Perm. Ed., "vacation.") We do not feel that vacation time, in the absence of a statute or departmental rule, legally authorized and duly adopted, has a monetary value for which payment may be made, but is free time allowed from active duty by statute or duly authorized and adopted rule for the rest and recuperation of the officer or employee.

Question 3 above-stated, poses the question of the right and authority of the governing board of the flood control district to amend its budget, or deviate therefrom, after it has been prepared and adopted under and pursuant to §378.28, F. S., which section regulates the preparation and adoption of the flood control district budgets. Although this section of the statutes mentions budget amendments following the public hearing on the tentative budget, we find nothing in said §378.28, F. S., authorizing amendments of the final flood control district budget; the only provision for any deviation from the final budget appears in the proviso at the end of the section, which provides for deviation from the budget in the case of emergencies as therein described. There is no express provision in the flood control statutes (Ch. 378, F. S.) for the amending of the budget prepared under and pursuant to said §378.28, F. S., after it has become final.

Budgetary statutes often make express provision for the amendment

of such budgets, or for transfers of funds from one budgeted account to another, after they have become final. See §§129.06 (county annual budgets), 237.20 (county school budgets), F. S., and others. We feel that in order to amend the work budget of a flood control district that the requirements for the preparation and adoption of the budget, insofar as here material, should be followed.

In the light of the above and foregoing statutes, laws and observations, the above-posed questions should be answered as follows:

Question 1 is answered in the negative, unless provision therefor be authorized by statute or by rule legally and properly adopted. Presently we doubt that such a rule would be authorized under current statutes.

Question 2 is answered in the negative, under statutes presently existing.

Question 3 is likewise answered in the negative, unless the final budget as adopted may expressly permit the desired change.

066-106—November 16, 1966

BAIL BONDS

MUNICIPAL COURTS—FORFEITURE—DISPOSITION OF FORFEITED FUNDS—AUTHORITY OF CLERK TO ENTER EX PARTE JUDGMENT

To: Warren M. Cason, County Attorney, Tampa

QUESTION:

> **Where a municipal court has declared a forfeiture of a bail undertaking under the provisions of §903.26, F. S., may the clerk of the circuit court automatically enter an ex parte judgment against the person bound on the undertaking in the manner provided in §903.27, F. S.?**

In February, 1960, Hon. Richard W. Ervin, then attorney general, rendered opinion 060-35 in which he ruled that the then existing provisions of Ch. 903, F. S., with respect to the estreature of bail bonds did not apply to bail bonds posted by persons charged with violating municipal ordinances.

However, by the enactment of §2, Ch. 61-406, the 1961 legislature amended §903.26, F. S., in several significant respects.

As amended in 1961, §903.26(2), F. S., provided that if there is a breach of the undertaking *"the state or municipal court"* before which the cause is pending shall declare the undertaking forfeited. (Emphasis supplied.)

As amended, §903.26(3)(b), F. S., provided that, 30 days after the forfeiture, "All *municipal officials*" having in their custody moneys deposited as bail, which has been forfeited, shall turn such moneys over "to the *municipality* to be deposited in a *designated municipal fund, . . .*" (Emphasis supplied.)

As amended, §903.26(4), F. S., provided that, 30 days after the forfeiture, *"all officials"* having in their possession bonds as authorized by §903.16, F. S., shall turn such bonds over to the clerk of the circuit court for sale and that the proceeds of such sale shall be disbursed "to the *county or municipality* for deposit." (Emphasis supplied.)

As amended, §903.26(5), F. S., imposed upon the *"clerk of the trial court"* the duty to transmit the undertaking and affidavits to the clerk of the circuit court for recording so that a lien will be created on the property described in the affidavits. (Emphasis supplied.)

As amended, §903.26(6), F. S., provided that at any time within 30 days from the date of forfeiture, the *"court before which the cause is pending"* shall, if specified conditions are met, direct that the forfeiture of the undertaking be discharged or, if the forfeiture has been paid, direct that remission thereof be made to the surety. This subsection contains a proviso authorizing the court to require the payment of costs and expenses incurred, as a condition to discharge or remission. (Emphasis supplied.)

(As thus amended in 1961, §903.26, F. S., is now in force except that Ch. 65-492 made amendments of a minor nature which have no bearing on whether the section applies to bail bonds posted by persons charged with violating municipal ordinances.) (Parenthetical matter added.)

Section 3 of the same Ch. 61-406 substantially amended §903.27, F. S., so that it now provides that if the forfeiture is not paid or discharged within 30 days from the date of forfeiture and the undertaking is one secured otherwise than by deposit of money or bonds, the prosecuting attorney of the court ordering the forfeiture or the state attorney on behalf of justice of the peace courts or other courts not having a prosecuting attorney, shall file "a certified copy of *the order of the court ordering such forfeiture*" in the office of the clerk of the circuit court and thereupon said clerk shall enter a judgment against the person bound by the undertaking.

It is clear that §903.26(2), F. S., authorizes a municipal court to declare the forfeiture of a bail bond given to answer a charge of violating a municipal ordinance, that subsection (3)(b) of said section provides for the payment into municipal funds of forfeited moneys deposited as bail to answer charges of violating municipal ordinances; and that subsection (4) of said section provides for conversion into municipal funds of bonds deposited to secure the appearance of persons charged with violating municipal ordinances.

In view of the provisions of said subsections, I am of the opinion that the legislature meant that the other provisions of §903.26, F. S., should also apply to bail bonds given to answer charges of violating municipal ordinances except such of them as contain language restricting their operation to bail bonds given to answer other charges.

Section 2 of Ch. 61-406 effected the above-mentioned amendments to §903.26, F. S. The next succeeding section of Ch. 61-406, viz., §3, amended §903.27, F. S., so that it provides a method of obtaining judgment "If *the forfeiture* is not paid or discharged within 30 days from the date of forfeiture *and the undertaking is one secured otherwise than by a deposit of money or bonds . . .*" (Emphasis supplied.) The words "undertaking . . . secured otherwise than by a deposit of money or bonds," contained in the immediately preceding quotation, necessarily refer to an undertaking with surety or sureties, as distinguished from one secured by a deposit of money or bonds, and "the forfeiture" mentioned in said quotation necessarily refers to the forfeiture of such an undertaking which §903.26(2), F. S., authorizes either a state court or a municipal court to declare. Further, the requirement of §903.27, F. S., that a certified copy of "the order of the court ordering such forfeiture" be filed in the office of the clerk of the circuit court is quite broad enough to include an order of a municipal court for the forfeiture of a bail undertaking given to answer a charge of violating a municipal ordinance and secured otherwise than by a deposit of money or bonds. Therefore, if the bail bond is one with a surety or sureties, I think that the clerk of the circuit court may enter a judgment thereon pursuant to §903.27, F. S.

Consequently, my opinion is that your question is properly answered in the affirmative.

066-107—December 5, 1966

PURCHASING COMMISSION

ASSIGNMENT OF PROCEEDS OF PURCHASE ORDER

To: Al J. Day, Director, State Purchasing Commission, Tallahassee

QUESTION:

Where a valid purchase order has been issued and the goods delivered, should you recognize an assignment of the funds due under the purchase order to third parties?

It should be noted at the outset that the purchase order, a copy of which was furnished, contains this statement: "Vendor: (Not transferable)."

American Jurisprudence, Vol. 43, Public Works and Contracts, §22, p. 763, contains a full discussion of the principles involved. It is there stated that, generally, the work to be done under public works contracts is not assignable, particularly the work to be done under the contract, or where the contract provides for no assignment as your purchase order indicates. However, this is not necessarily true in connection with an assignment of the proceeds of a contract after the work has been performed or the goods delivered. Certainly, such an assignment can, and frequently is, used to aid in the financing of the work or materials.

Objections to assignments of the proceeds come about in connection with the extra work necessary in the auditing of the accounts to determine to whom the money is correctly payable.

It is my opinion, therefore, that there is no statutory prohibition against the assignment of the right to receive the proceeds of a public contract. In the event that to accept the assignment would, in your judgment, create confusion in payment or create a possibility that valid release of liens or other claims may not be forthcoming, or if there are other facts and circumstances that may result in hardship or detriment to the state, you are justified in declining to accept the assignment.

066-108—November 29, 1966

JUDGES

ELIGIBILITY OF COUNTY JUDGE TO RECEIVE BACK COMPENSATION FOR SERVICES RENDERED AS JUDGE OF COUNTY COURT

To: William B. Goodson, County Attorney, Dade City

QUESTION:

Is a county judge in a county with a population of less than 22,000 entitled to the compensation provided for in §34.20, F. S., as personal income when he is not receiving compensation as judge of the county court under any special act or general act of local application?

In the instant situation the population of both counties under consideration here (DeSoto and Pasco) for the period involved is less than 22,000. According to the official decennial census table in Vol. 3 of the 1965 Florida Statutes, it appears that the population of DeSoto county has never exceeded or even approached 22,000. The claim in Pasco county

on behalf of judge A. J. Hayward, Jr., is for the period 1951-1958 during which time the population of Pasco county was only 20,529 according to the 1950 decennial census which was in effect until Nov. 25, 1960. See AGO 061-15, p. 26 of the 1961-62 Biennial Report of the Attorney General.

In each of the inquiries received it was indicated that there were no special acts or general acts of local application (population acts) relating to the compensation of the judge of the county court in either DeSoto or Pasco county and the research on the part of this office indicates this to be the case. Assuming then that there are no applicable special or population acts it would appear that the question as presented herein has been put to rest by judge Pierce speaking for the 2nd Dist. Ct. of App. in the Parker v. Thomas, Fla. App., 185 So.2d, p. 513 wherein the court laid down the following rule:

> As we interpret the statutes, the legislature intended to divide the salaries of the judges of the county courts into four categories based on population. First, if a county has a population of more than twenty-four thousand people, then Sec. 34.21 is applicable. *Second, if a county has a population of twenty-two thousand people or less, and no special act (or general act of local application) is applicable, then Sec. 34.20 applies.* Third, if a county has more than twenty-two thousand people, but not exceeding twenty-four thousand people, and no special act (or general act of local application) is applicable, then Sec. 34.21 applies. Fourth, and finally, if a county has twenty-four thousand people or less, and there is an applicable special act (or general act of local application) then such special or general act governs. (Emphasis supplied.)

The italicized portion of the above-quoted language would indicate that §34.20, F. S., is applicable in cases such as those discussed herein. The only remaining question then is as to whether the "eighteen hundred dollars per annum, payable in monthly installments" is to be considered income of the office or income which is personal to the judge in addition to that prescribed in §145.061, F. S.

In the Parker case, *supra*, the court said at p. 514 that the provisions of §§34.20 and 34.21, F. S., must be read together and in so construing these statutes judge Pierce concluded in the last paragraph of the opinion that:

> It is the opinion of this Court that the legislature intended to grant the County Judge an additional salary for being also the Judge of the County Court.

Based upon the above and foregoing it would appear that in those counties where the population is less than 22,000 and where the judge of the county court receives no additional compensation under special or population acts, he would be entitled to the $1,800 per annum provided for therein as personal income in addition to that provided for the county judge in §145.061, F. S.

Accordingly, your question as set out above is answered in the affirmative.

066-109—December 12, 1966

REGULATION OF VOCATIONS AND PROFESSIONS

FUNERAL DIRECTORS—MAINTENANCE AND OPERATION OF SEPARATE PREPARATION OR OPERATING ROOM FOR EACH ESTABLISHMENT

To: Mrs. Robbie E. Weaver, Executive Secretary, State Board of Funeral Directors and Embalmers, Jacksonville

QUESTION:

Is it necessary to have an operating room or preparation room in a new funeral establishment when the applicant has other funeral establishments in the immediate area and would not need to use the operating room or preparation room in the new facility?

It appears from the information supplied by you that a licensed mortician has made application for the registration and an operating license of a new establishment to be opened in the near future. It also appears that this mortician has other funeral homes in the immediate area and he is concerned with the necessity for an operating or preparation room in his new establishment when this work can be accomplished in one of the other establishments.

It appears that the board has a responsibility to inspect the facilities of a funeral home, mortuary or funeral establishment to determine if it has the necessary equipment and facilities before a license can be issued by the Florida board of funeral directors and embalmers. This requirement is found under the provisions of §470.10(8), F. S., which provides as follows:

> Every person who maintains a funeral home, mortuary or funeral establishment where the professions of funeral directing and embalming are practiced, shall maintain a preparation or operating room where embalming is practiced in the establishment, which preparation or operating room must be properly screened, must have a sanitary floor, must have a glass, porcelain or metal-lined operating table; must contain necessary instruments and supplies for the preparation or embalming of dead human bodies, and must have good ventilation, running water and proper sanitary plumbing, all of which plumbing must be connected with a sewer, septic tank or cesspool, which operating room must be maintained in a clean and sanitary condition at all times. The board shall adopt such rules, regulations and classifications as may be reasonable and proper to define what shall be deemed the proper drainage and ventilation and what instruments are necessary and suitable in a funeral establishment, which rules must conform with the rules of the state board of health. Every funeral establishment operated and conducted by any person licensed under this chapter shall at all times be subject to the inspection of the board, or any of its designated representatives or agents or local or state board of health inspectors. No funeral home, mortuary or funeral establishment shall be located in a cemetery.

It would appear from a reading of the foregoing section of law that there is some doubt as to the statutory necessity of a preparation or operating room since the statute utilizes the language "shall maintain a preparation or operating room where embalming is practiced in the

establishment." This doubt must fall, however, since the provision of §470.01(6)(b), F. S., defines a funeral home, mortuary, funeral establishment or funeral chapel as follows:

> (6) The term 'funeral home,' 'mortuary,' 'funeral establishment,' or 'funeral chapel' shall be construed to be a place at a specific street address or location where the profession of funeral directing and embalming, as defined in this chapter, are practiced in the care, planning and preparation for burial or cremation or transportation of dead human bodies. All of such places shall consist of and shall maintain the following facilities:
>
> * * * * *
>
> (b) A preparation room equipped with a sanitary floor and necessary drainage and ventilation and containing necessary instruments and supplies for the preparation and embalming of dead human bodies for burial or transportation.

When the definition of a funeral home, mortuary, funeral establishment or funeral chapel is considered in pari materia with the provisions of §470.10(8), F. S., it is clear that it is mandatory that a preparation room be maintained in a funeral home in order for it to qualify as such under the statutory definition.

Accordingly, it would appear from the provisions of the applicable sections of law, that it is mandatory for a funeral home, mortuary, funeral establishment or funeral chapel to maintain an operating or preparation room in the establishment before the board can approve it for a license.

066-110—December 19, 1966

RETIREMENT

STATE AND COUNTY OFFICERS AND EMPLOYEES SYSTEM—SCHOOL BOARD MEMBERS WHO RECEIVE ONLY EXPENSES

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

> **1. May members of county school boards, who were previously paid a salary, but now serve without salary, although reimbursed for their actual expenses, qualify as members of the state and county officers and employees retirement system of this state?**
>
> **2. May members of county school boards who have, since becoming such members, served without salary, although reimbursed for their actual expenses, qualify as members of the state and county retirement system of this state?**
>
> **3. May such board members, authorized and electing to come under the said retirement system, do so retroactively by now making contributions that should have heretofore been made?**

Of primary concern are the present and past members of the board of public instruction for Dade county, who at least as early as 1939 (Ch. 19766, Laws of Florida, 1939) were paid a salary until the adoption of Ch. 30107, Laws of Florida, 1955, and the effective date thereof, which act provided that no further salaries would be paid the members of the said board of public instruction, although they would be paid a sufficient amount to substantially cover their actual expenses while

serving as such members. This policy of paying such members no salary appears to have been continued by subsequent legislation (see Chs. 57-913, 59-959 and 63-886). It does not appear that salary has been paid the said members of the Dade county board of public instruction since the effective date of said Ch. 30107, 1955, that is, 60 days from and after June 3, or August 2, 1955. Such board members were paid a salary until such date, but have not been paid salaries since such date. These dates are given by way of example only, and may or may not be exact as to point of time.

We are not advised whether such members of the Dade county board of education may have become and were members of the state and county officers and employees retirement system, and made contributions thereto, prior to effective date of said Ch. 30107, 1955. The state officers and employees retirement system (former Ch. 121, F. S.) and the county officers and employees retirement system (former Ch. 134, F. S.) were consolidated and revised by Ch. 29801, Laws of Florida, 1955. We are not advised whether any of the members of the Dade county school board became members of either of the above-mentioned retirement systems, and made contributions thereto, prior to the enactment of Ch. 30107, 1955; this would appear to be a possibility. For one to be qualified to become a member of the state and county officers and employees retirement system he must bring himself within the purview and intention of §122.02(1), F. S., or of either former §121.02(1) or §134.02(1), F. S.; provided, however, he has not heretofore withdrawn his contributions, and has continued to be a member of present Ch. 122, F. S.

State and county officers and employees, within the purview and intention of the Florida state and county officers and employees retirement system §122.02(1), F. S., states:

> . . . all full-time officers or employees who receive compensation for services rendered from state or county funds . . .; provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salaries by the employing state or county agency or state or county official and shall not include amounts allowed for professional employees for special or particular service or for subsistence or traveling expenses . . .

This language has not been changed materially since the consolidation of the separate state and county retirement systems by Ch. 29801, Laws of Florida, 1955, and is substantially, insofar as here concerned, the same as that contained in §134.02(1), F. S., 1949, 1951 and 1953, relating to the county officers and employees retirement system established by Ch. 22938, 1945, and by the amendment of said act by Ch. 23959, 1947. From these observations it appears that before a state or county officer or employee may become a member of the state and county officers and employees retirement system, likewise as to the prior county officers and employees retirement system, such officer or employee must also "receive compensation for services rendered from state or county funds . . . ; provided that such compensation in whatever form paid shall be specified in fixed monthly salaries by the employing state or county agency or state or county official . . ."

Members of the Dade county board of public instruction who have been, or are now, serving without compensation, do not qualify as members of the state and county officers and employees retirement system for the period or periods of their service as members of the said board without pay or salary. This does not affect previous or subsequent service credit for those periods when they were serving with salary or

other official compensation; however, allowances for "expenses" or like and similar purposes do not and will not qualify them for service credit under the state and county officers and employees retirement system.

These statutes, laws and observations lead to the following answers to the questions above posed:

Question 1 is answered in the affirmative for that period of time during which they were paid a salary, but in the negative for that period of time during which they were not paid a salary; the reimbursement for actual expenses is not within the statute.

Question 2 is answered in the negative, unless such officer or employee is entitled to other service credit within said Ch. 122, F. S.

The answer to question 3 seems to be dependent upon the factual circumstances in each particular case, as applied to the requirements of §122.03, F. S., and within the limitations above discussed concerning salary and compensation. Retroactive service credit is governed by the provisions of said §122.03, F. S.

066-111—December 20, 1966

TAXATION

PRECEDENCE OF TAX LIEN OVER LANDLORD'S LIEN—SALE OF TANGIBLE PERSONAL PROPERTY UNDER TAX WARRANT, EFFECT ON LIEN OF EXISTING CHATTEL MORTGAGE

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. When the sheriff holds a distress for rent sale, and the tax collector has had no knowledge of the said sale prior to the date of the sale, and the tax collector presents a tax warrant for prior tangible personal property taxes, or the current year's tangible tax, would the tax collector's lien take precedence over the landlord's lien?

2. Should the tax warrant be filed with the sheriff in time for said warrant to be included in the notice of sale does the tax warrant take precedence over the landlord's sale?

3. Would the sale of tangible personal property sold under tax warrant cancel an existing chattel mortgage upon said personal property?

Section 192.21, F. S., provides, insofar as here material, that:

> All taxes imposed pursuant to the constitution and the laws of this state shall be a first lien *superior to all other liens* on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment, . . . (Emphasis supplied.)

Nothing in this section subordinates the lien imposed by it to any recorded or other liens. Section 200.02, F. S., provides that:

> All tangible personal property taxes shall be a lien on *all of the personal property* of the taxpayer in the county in which they are assessed from January 1 for which year the property is liable to assessment. The lien of tangible personal property taxes shall be superior to all other liens, except liens for other taxes, state, county and municipal . . . (Emphasis supplied.)

Under §200.27, F. S.:

> Taxes on tangible personal property shall be deemed delin-

quent on April 1 of the year following that for which the assessment was made, . . .

According to the provisions of §192.28, F. S., it is the duty of the sheriffs conducting judicial sales under process or order of any court to pay from the proceeds of any such sale, after payment of certain fees: ". . . all taxes, state, county and municipal, which may be assessed, due and unpaid against the said property, . . ."

In view of the foregoing statutory provisions the tax warrant for tangible personal property taxes would take precedence over and be superior to the landlord's lien provided for in §83.08, F. S.

The proceeds of any sale pursuant to said warrant would first be applied towards the tax lien. The said tax lien would be superior to any chattel mortgage on the same property. (See Clermont-Minneola Country Club v. Coupland, 143 So. 133 and Gailey v. Robertson, 123 So. 692) Consequently, in the event that the amount realized from such sale is insufficient to cover the amount of the delinquent taxes, it would have the effect of extinguishing the lien of a chattel mortgage on such property (See 51 Am. Jur. Taxation, p. 938), assuming, of course, the property has been purchased by a bona fide third party. It should be noted that should the proceeds of such sale be in excess of the amount necessary to satisfy the tax lien, then in that event such excess should be paid to the chattel mortgagee.

In view of the foregoing your specific questions are answered as follows:

1. The tax collector's lien would take precedence over the landlord's lien.

2. The tax warrant would take precedence over the landlord's lien.

3. The sale of tangible personal property under the tax warrant would seem to have the effect of extinguishing the lien of an existing chattel mortgage on such personal property.

REPORTS

AND

STATISTICS

CONSTITUTIONAL AMENDMENTS ADOPTED BY THE 1965 LEGISLATURE

The 1965 Regular Session of the Legislature adopted eighteen proposed amendments to the Florida Constitution.

Five of these amendments were voted on at a special election held on November 2, 1965, four of which were ratified. The remaining thirteen proposed amendments were ratified at the general election on November 8, 1966.

The proposed amendment to Article IX rejected at the November 2, 1965, election would have authorized the issuance of bonds without legislative approval in an amount not to exceed $300,000,000.00 for the construction and reconstruction of primary roads into four or more lane highways.

The seventeen amendments ratified at the general election in 1966 are set forth below.

LEGISLATIVE DEPARTMENT
ARTICLE III

SECTION 2A. **Special session for organizational purposes.**—The legislature shall meet on the first Tuesday in November after the general election for the purpose of organization, swearing in new members and selecting officers. No other business shall be transacted.

History.—Added S.J.R. 655, 1965; adopted 1966.

JUDICIAL DEPARTMENT
ARTICLE V

SECTION 5. **District Courts of Appeal.**—

(1) APPELLATE DISTRICTS. The state shall be divided into four or more appellate districts of contiguous counties as the Legislature may from time to time prescribe, and there shall be organized a district court of appeal in each district.

(2) ORGANIZATION; NUMBER AND SELECTION OF JUDGES. There shall initially be three judges in each district court of appeal, and the Legislature may provide for additional judges for any district court of appeal and may reduce the number of any district to not less than three. Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact. After a change in the territorial limits of any appellate district, all proceedings then pending within the jurisdiction of each district court of appeal shall be transferred to the court then having jurisdiction, except causes which have been orally argued.

History.—Am. H.J.R. 810, 1955; adopted 1956; (1) (2) Am. H.J.R. 1601, 1959; adopted 1960; (1) (2) Am. S.J.R. 261, 1965; adopted 1965.

SECTION 7. **County Judges' Courts.**—

(1) ESTABLISHMENT. There shall be a county judge's court in each county.

(2) COUNTY JUDGES. There shall be in each county a county

judge or county judges in such number as the legislature shall provide who shall be elected by the qualified electors of the county at the time and places of voting for other county officers and shall hold office for four years. Compensation shall be as provided by law.

(3) JURISDICTION. The county judges' courts shall have original jurisdiction in all cases at law in which the demand or value of property involved shall be as provided by the legislature; of proceedings relating to the forcible or unlawful detention of lands and tenements; and of such criminal cases as the legislature may prescribe. The county judges' courts shall have jurisdiction of the settlement of the estate of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate. The county judge shall have the power of committing magistrates.

(4) PRESCRIBED QUALIFICATION AUTHORIZED. The legislature may require by special act, subject to approval by referendum within the county, that the county judge of any county be a member of The Florida Bar; provided such law shall not affect the term of office or the reelection of any county judge holding office on the date of its enactment who is not a member of The Florida Bar.

History.—Am. H.J.R. 810, 1955; adopted, 1956; (2A) added H.J.R. 1649, 1965; adopted, 1965; Am. S.J.R. 662, 1965; adopted, 1966; (4) added H.J.R. 175, 1965; adopted, 1966.

SECTION 9. Criminal Courts of Record.—

(1) ORGANIZATION AND JUDGES. The legislature may provide for the establishment of a criminal court of record in any county. Judges of criminal courts of record shall be elected for a term of four years by the qualified electors of the county, in the same manner as other state and county officials. Their compensation shall be fixed by law and paid by the county.

In any county having a population in excess of 125,000 and not more than 250,000 according to the last decennial federal census, or census authorized by the legislature and paid for by the county, the legislature may provide for an additional judge of the criminal court of record for such county, provided that any law having for its purpose the creating of an additional judge of said court in such county shall not become effective unless ratified by a majority of the participating voters of such county in an election presenting the same for approval or rejection. In any county having a population of more than 250,000 according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.

(2) JURISDICTION. The said courts shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively.

(3) TERMS. There shall be six terms of said courts in each year.

(4) PROSECUTING ATTORNEY; TERM. There shall be for each of said courts a prosecuting attorney who shall be elected for a term of four years by the qualified electors of the county as other state and county officials are elected and whose compensation shall be fixed by law.

(5) INDICTMENT AND INFORMATION. All offenses triable in said court shall be prosecuted upon information under oath, to be filed by the prosecuting attorney, but the grand jury of the circuit court for the county in which said criminal court is held may indict for offenses triable in the criminal court. Upon the finding of such

indictment the circuit judge shall commit or bail the accused for trial in the criminal court, which trial shall be upon information.

(6) CRIMINAL COURTS OF RECORD SUPERSEDE CRIMINAL JURISDICTION OF COUNTY COURTS. The county courts in counties where such criminal courts are established shall have no criminal jurisdiction and no prosecuting attorney.

(7) CLERK. The clerk of said court shall be elected by the electors of the county in which the court is held and shall hold office for four years, and his compensation shall be fixed by law. He shall also be clerk of the county court. The sheriff of the county shall be the executive officer of said court, and his duties and fees shall be fixed by law.

(8) STATE ATTORNEY ELIGIBLE FOR APPOINTMENT AS COUNTY SOLICITOR. The state attorney residing in the county where such court is held shall be eligible for appointment as county solicitor for said county.

(9) CRIMINAL COURTS OF RECORD MAY BE ABOLISHED BY LEGISLATURE. Such courts may be abolished by the legislature.

(10) The clerk of the circuit court in and for Palm Beach county shall also be and serve as the clerk of the Palm Beach county criminal court of record.

History.—Am. H.J.R. 810, 1955; adopted 1956; (10) added H.J.R. 586, 1965; adopted, 1965.

SECTION 9C. **Hillsborough County, offices of the state attorney and county solicitor.**—On and after the first Tuseday after the first Monday in January, 1969, there shall be a Prosecuting Attorney of the Criminal Court of Record of Hillsborough County to be known as County Solicitor who shall be a separate official elected for a term of four years by the qualified electors of the county as other state and county officials are elected and whose compensation shall be fixed by law. Said County Solicitor shall perform the functions and duties of a County Solicitor in the Criminal Court of Record of Hillsborough County, Florida, as prescribed by law in all noncapital felony cases and other lesser offenses in said court's jurisdiction.

After said time there shall also be a State Attorney of the Thirteenth Judicial Circuit in and for Hillsborough County who shall be a separate official elected by the qualified electors of that circuit in the same manner as other state and county officials to serve a term of four years who shall fulfill the duties prescribed by law, including, but not limited to, prosecution of all capital felony cases.

The legislature may provide for Assistant State Attorneys and Special Investigators for the State Attorney and for Assistant County Solicitors and Special Investigators for the County Solicitor of Hillsborough County, Florida, and all Assistant State Attorneys and Assistant County Solicitors and Investigators shall be appointed by the State Attorney and the County Solicitor respectively and sworn in by the court, and such Assistant State Attorneys and County Solicitors shall work under the direction of said State Attorney and County Solicitor and shall have full authority to do and perform any of the official duties and acts that the State Attorney and County Solicitor may do and perform.

Pending informations filed in the Criminal Court of Record of Hillsborough County shall not be invalidated by this amendment or affected in any way hereby; and the County Solicitor may file amended informations in any such cases if and when necessary.

The County Commissioners shall, upon this amendment becoming effective, apportion the funds appropriated for the operation of the State Attorney's Office between the State Attorney's Office and the County Solicitor's Office on the basis of the case load, personnel assigned in the State Attorney's Office to handle the duties of the newly created County Solicitor, and the cost of operations of said two offices. Thereafter, the Board of County Commissioners of Hillsborough County shall appropriate such funds as to them may be reasonably required for the operation of the State Attorney's Office and County Solicitor's Office.

It is the express intent of the legislature and the electors of the State of Florida to create offices of the State Attorney and County Solicitor in Hillsborough County, Florida, which shall be separate, distinct, and unconnected with each other so that the same shall be and exist as they did in said county before the first Tuesday after the first Monday in January of 1961.

History.—Added S.J.R. 532, 1957; adopted 1958; Am. S.J.R. 6, 1965; adopted 1966.

SECTION 11A. **Orange County; boundaries of Justice of Peace Districts.**—The board of county commissioners of Orange County may at any time upon resolution, alter, change or revise the boundary of any justice of the peace district within Orange County without referendum; provided that no existing justice of the peace district shall be dissolved or otherwise eliminated except as otherwise provided by law. A public hearing shall be held on the proposed resolution with ten days' notice published in a newspaper of general circulation in the county.

History.—Added H.J.R. 748, 1965; adopted 1966.

SECTION 13A. **Eligibility requirements for justices and certain judges.**—

(1) No person shall be eligible for the office of justice of the supreme court or judge of a district court of appeal unless he is a citizen of this state, and unless he is, and for a period of ten years has been, a member of The Florida Bar; and no person shall be eligible for the office of judge of a circuit court unless he is a citizen of this state and unless he is, and for a period of five years has been, a member of The Florida Bar. The judges of other courts shall be citizens of this state and residents of the county served. Any senator or member of the house of representatives otherwise qualified shall be eligible for appointment or election to any judicial office, notwithstanding that it may have been created or its emoluments increased during the time for which he was elected.

History.—Added Com. Sub. for S.J.R. 485, 1965; adopted 1966.

SECTION 17A. **Discipline, retirement and removal of justices and certain judges.**—

(1) Except as it provides for mandatory retirement, this section shall apply to every justice of the supreme court and judge of the district courts of appeal and circuit courts. It shall be the sole method of disciplining, automatically or involuntarily retiring or removing such justices or judges, provided that all such justices or judges shall be liable to impeachment for any misdemeanor in office. All justices and judges shall automatically retire at age seventy except those who held any judicial office on July 1, 1957; provided, however, that such mandatory retirement shall not prohibit a justice or judge from serving the entire term to which he was appointed or elected if he attains his seventieth birthday after serving at least one half of such term.

(2) There shall be a judicial qualifications commission composed of:

(a) Two judges of the district courts of appeal appointed by the judges of those courts and two circuit court judges appointed by the judges of those courts.

(b) Two members of The Florida Bar, who shall have practiced law in this state for at least eight years, appointed by the board of governors of The Florida Bar; and

(c) Three citizens, each of whom shall have been a resident of this state for at least five years, neither of whom shall be a justice or judge of any court, active or retired, nor a member of The Florida Bar, appointed by the governor. When a member appointed under paragraph (a) ceases to be a judge of the court from which he was appointed or a member appointed under paragraph (b) ceases to be a member of The Florida Bar, or a member appointed under paragraph (c) becomes a justice or judge of any court or a member of The Florida Bar, his membership on the commission shall terminate and a successor shall be appointed for the remainder of his term. No member of the commission appointed under paragraphs (b) or (c) shall be eligible to succeed himself. Except as provided herein, no member of the commission shall hold a public office and no member shall hold office in a political party. The compensation and terms of office of members of the commission shall be fixed by law, provided that not more than one third of the terms of the members shall terminate in any two year period. No recommendation of the commission to the supreme court shall be valid unless concurred in by two thirds of its members. The commission shall elect one of its members to serve as chairman.

(3) Any justice or judge to whom this section applies may be disciplined by private reprimand or removed from office for willful or persistent failure to perform his duties or habitual intemperance or conduct unbecoming a member of the judiciary or he may be involuntarily retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature. After such investigation as it deems necessary, the judicial qualifications commission may conduct a hearing concerning the removal, discipline or retirement of a justice or judge or request the supreme court to appoint three special referees, who shall be active or retired justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the commission. All hearings shall be held in the county in which the justice or judge involved resides. Testimony shall be under oath, administered by a member of the commission or a special referee, and subject to the penalties for perjury. If after hearing, or after considering the record and report of the referees, the commission finds good cause therefor, it shall recommend to the supreme court the removal, discipline or retirement of the justice or judge. The supreme court shall review the record of the proceedings on the law and facts and shall order removal, discipline or retirement, as it finds just and proper, or wholly reject the commission's recommendation. Upon an order for involuntary retirement for disability, the justice or judge shall thereby be retired at retirement pay to be fixed by law which as to a justice of the supreme court, judge of a district court of appeal or circuit judge shall not be less than two thirds of his then compensation if he has served for ten years or more as justice or judge of such court or courts. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order. The supreme court shall make rules providing for the procedure before the commission and the referees and the extent to which communications shall be privileged or confidential,

provided that upon the entry of an order of discipline, removal or retirement the record shall no longer remain confidential. A justice or judge shall be disqualified in any proceeding involving his own discipline, retirement or removal. The supreme court shall by rule provide for the disqualification of any member of the commission or referee and for the ad hoc appointment of a person to take the place of a disqualified person.

(4) In the event a judge is removed from office, his judicial service shall not provide immunity from disciplinary proceedings for professional misconduct performed during his term of office or prior thereto.

History.—Added S.J.R. 485, 1965; adopted 1966.

SUFFRAGE AND ELIGIBILITY
ARTICLE VI

SECTION 1. **Electors.**—Every person of the age of twenty-one years and upward that shall, at the time of registration, be a citizen of the United States, and that shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year and in the county for six months, shall in such county be deemed a qualified elector at all elections under this constitution. Provided however, the legislature may provide for voting in national elections for president and vice-president of the United States by persons who have become residents of the state of Florida but who have not yet fulfilled the residency requirements of electors.

History.—Am. H.J.R. 2, 1893; adopted 1894; Am. H.J.R. 344, 1965; adopted 1966.
cf.—19th Amendment to U. S. Constitution.

COUNTIES AND CITIES
ARTICLE VIII

SECTION 6A. **Appointive county superintendents of public instruction; terms and employment.**—In those counties authorized to appoint a superintendent of public instruction under Article XII of the state constitution the superintendent shall serve at the pleasure of the board provided that the board may enter into a contract of employment with such appointed county superintendent which contract shall not extend beyond the thirtieth day of June in the year in which the terms of a majority of the members of the board of public instruction shall expire. The county superintendent shall not be commissioned by the governor but shall be required to file with the county board of public instruction a good and sufficient bond and in such sum and upon such condition as the legislature by law shall prescribe for elective superintendents as provided by Section 7, Article VIII of the state constitution.

History.—Added S.J.R. 221, 1965; adopted 1966.

SECTION 24. **Hillsborough County, home rule charter.**—

(1) The electors of Hillsborough county are hereby granted the power to adopt a charter for a government which shall exercise any and all powers for county and municipal purposes which this constitution or the legislature, by general, special or local law, has conferred upon Hillsborough county or any municipality therein. Such government shall exercise these powers by the enactment of ordinances which relate to government of Hillsborough county and provide suitable penalties for the violation thereof. Such government shall have no power to create or abolish any municipality, except as otherwise provided herein.

(2) The method and manner by which the electors of Hillsborough county shall exercise this power shall be set forth in a charter for

the government of Hillsborough county which charter shall be presented to said electors by any charter commission established by the legislature. The legislature may provide for the continuing existence of any charter commission or may establish a charter commission or commissions subsequent to any initial commission without regard to any election or elections held upon any charter or charters theretofore presented. A charter shall become effective only upon ratification by a majority of the electors of Hillsborough county voting in a general or special election as provided by law.

(3) The number, qualifications, terms of office and method of filling vacancies in the membership of any charter commission established pursuant to this section and the powers, functions and duties of any such commission shall be provided by law.

(4) A charter prepared by any commission established pursuant to this section shall provide that:

(a) The governments of the city of Tampa and the county of Hillsborough shall be consolidated, and the structure of the new local government shall include:

1. An executive branch, the chief officer of which shall be responsible for the administration of government.

2. An elected legislative branch, the election to membership, powers and duties of which shall be as provided by the charter.

3. A judicial branch, which shall only have jurisdiction in the enforcement of ordinances enacted by the legislative branch created by this section.

(b) Should the electors of the municipalities of Plant City or Temple Terrace wish to consolidate their governments with the government hereinabove created, they may do so by majority vote of the electors of said municipality voting in an election upon said issue.

(c) The creditors of any governmental unit consolidated or abolished under this section shall be protected. Bonded or other indebtedness existing at the effective date of any government established hereunder shall be enforceable only against the real and personal property theretofore taxable for such purposes.

(d) Such other provisions as might be required by law.

(5) The provisions of such charter and ordinances enacted pursuant thereto shall not conflict with any provision of this constitution nor with general, special or local laws now or hereafter applying to Hillsborough county.

(6) The government established hereunder shall be recognized as a county, that is one of the legal political subdivisions of the state with the powers, rights, privileges, duties and obligations of a county, and may also exercise all the powers of a municipality. Said government shall have the right to sue and be sued.

(7) Any government established hereunder shall be entitled to receive from the state of Florida or from the United States or from any other agency, public or private, funds and revenues to which a county is, or may hereafter be entitled, and also all funds and revenues to which an incorporated municipality is or may hereafter be entitled, and to receive the same without diminution or loss by reason of any such government as may be established. Nothing herein contained shall preclude such government as may be established hereunder from receiving all funds and revenues from whatever source now received, or hereinafter received provided by law.

(8) The board of county commissioners of Hillsborough county shall be abolished when the functions, duties, powers and responsibilities of said board shall be transferred in the manner to be provided by the

charter to the government established pursuant to this section. No other office provided for by this constitution shall be abolished by or pursuant to this section.

(9) This section shall not restrict or limit the legislature in the enactment of general, special or local laws as otherwise provided in this constitution.

History.—Added Com. Sub. for H.J.R. 1987, 1965; adopted 1966.

TAXATION AND FINANCE
ARTICLE IX

SECTION 13. **Motor vehicles subject to single property tax.**—Motor vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles, which license tax shall be in such amount and levied for such purpose as the legislature may, by law, provide, and shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property.

"Motor vehicles" as that term is used herein also includes mobile homes, trailer coaches, house trailers, camper type mobile homes mounted and transported wholly upon the body of a self-propelled vehicle, or any type of trailer or vehicle body without independent motive power drawn by or carried upon a self-propelled vehicle designed for and used either as a means of transporting persons or property over the public streets and highways of this state or for furnishing housing accommodations, or both; provided, however, any included vehicle herein shall be subject to a license tax as an operable motor vehicle regardless of its actual use unless the included vehicle is permanently affixed to the land, in which case it shall be taxable as real property.

History.—Added, H.J.R. 753, 1929; adopted 1930; Am. S.J.R. 751, 1965; adopted 1965.

SECTION 14A. **Exemption; stock in trade.**—Goods, wares, commodities and merchandise, commonly known as stock in trade or inventory and livestock, may be exempted in part from ad valorem taxation as personal or tangible property as the legislature may prescribe by general law of uniform operation throughout the state.

History.—Added, H.J.R. 578, 1965; adopted 1966.

MISCELLANEOUS PROVISIONS
ARTICLE XVI

SECTION 12. **Seal of State of Florida; state flag.**—The present seal of the state shall remain the seal of the state of Florida. The state flag shall conform with standard commercial sizes and be of the following proportions and description: The seal of the state, of diameter one half the hoist, in the center of a white ground. Red bars in width one fifth the hoist extending from each corner toward the center, to the outer rim of the seal.

History.—Am. J.R. 4, 1899; adopted 1900; Am. S.J.R. 433 1965; adopted 1966.

SECTION 29. **Condemnation of property; compensation.**—No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by twelve jurors in a court of competent jurisdiction, as shall be prescribed by law.

History.—Am. S.J.R. 67, 1965; adopted 1966.

AMENDMENTS
ARTICLE XVII

SECTION 2. **Method of revising constitution; convention.**—If at any time the legislature, by a vote of two-thirds of all members of both houses shall determine that a revision of this constitution is necessary, such determination shall be entered upon their respective journals, with the yeas and nays thereon. Notice of said action shall be published weekly in one newspaper in every county in which a newspaper is published, for three months preceding the next general election of representatives, and in those counties where no newspaper is published, notice shall be given by posting at the several polling precincts in such counties for six weeks next preceding said election. The electors at said election may vote for or against the revision in question. If a majority of the electors so voting be in favor of revision, the legislature chosen at such election shall provide by law for a convention to revise the constitution and shall provide for the conduct and rules of such convention. The convention shall be held within six months after passage of the law, providing for the convention. Delegates to the convention shall equal in number and be apportioned among the various counties as the membership of the house of representatives is apportioned. The convention upon adoption of a revised constitution shall certify a copy of it to the governor. Five printed copies of the revised constitution shall be transmitted by the secretary of state to the clerk of the circuit court of each county, and five to the county judge of each county. These copies shall be distributed throughout the various counties and shall be available for examination by any person desiring to examine same for a period of at least three months immediately preceding the next general election. At this election the revised constitution shall be submitted to the electors of the state, for approval or rejection. If a majority of the electors voting upon the revision of the constitution shall approve same, the revised constitution shall take effect immediately upon such approval by the electors.

History.—Am. S.J.R. 115, 1965; adopted 1966.

CONSTITUTIONAL AND STATUTORY DUTIES OF ATTORNEY GENERAL

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power, it is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. State ex rel Landis, Attorney General, et al v. S. H. Kress & Co., 115 Fla. 189, 155 So. 823.

CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

The state constitution provides the following relative to the Attorney General:

1. Member of pardon board (§12, Art. IV).
2. Member of board of commissioners of state institutions (§17, Art. IV).
3. Administrative officer to the governor; member of cabinet (§20, Art. IV).
4. Legal adviser to governor and each of the officers of the executive department (cabinet) (§22, Art. IV).
5. Reporter for supreme court (§22, Art. IV).
6. Submit biennial reports to the governor to be presented to the legislature (§27, Art. IV).
7. Prepare legislation each session pursuant to recommendations of conference of circuit judges (§6, Art. V).
8. Handle validation proceedings for bonds issued by outdoor recreational development council (§17, Art. IX).
9. Member of board of education (§3, Art XII).

STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the state of Florida (§16.01).

2. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01, F. S., and §22, Art. IV, Fla. Const.).

3. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01, F. S., and §27, Art. IV, Fla. Const.).

4. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).

5. Report to each session of the legislature such legislation as he may deem advisable concerning defects in laws.

6. Exercise general superintendence and direction over the several state attorneys (§16.08).

7. Direct and be in charge of the statutory revision department, which also includes legislative bill drafting (§§16.43, 16.44, 16.46-16.48, 16.50, 16.51).

8. Participate with other states in preserving the constitutional integrity of the state (§16.52).

9. Approve the bond of the comptroller (§17.01).

10. Act as legal adviser to the state auditing department (§21.091).

11. Act as emergency successor to governor's office (§22.04).

12. Report to legislature on conference of circuit judges (§26.55).

13. Represent juvenile court in appeals proceedings (§39.14(5)).

14. Conduct quo warranto proceedings (§80.03).

15. Represent the state in proceedings under the declaratory judgment law where the constitutionality of statutes is involved (§87.10).

16. Uniform reciprocal enforcement of support law, state information agency (§88.171).

17. Approve seal for the supervisors of elections (§98.161).

18. Examine audited reports of state executive committee and file same as public record (§103.121).

19. Report and turn over to state treasurer all perquisites fixed by law accruing from administration (§111.02).

20. Handle appeals from judgment of forfeiture of unclaimed property (§116.32).

21. Approve title to real estate in which the state is interested (§135.16).

22. Beach and shore preservation, institute proceedings to enjoin or abate nuisance (§161.081).

23. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy act lands (§196.21).

24. Assist in the collection and enforcement of retail store license taxes (§204.13).

25. Assist in enforcing law in sales of businesses (§212.10(2)).

26. Introduce proceedings to collect defaulted investments and otherwise protect state funds invested (§215.46).

27. Prepare contracts for purchase of uniform school books (§233.16).

28. Approve school district bonds (§236.48).

29. Prosecute violations of school budget law (§237.23).

30. Act as legal adviser to board of trustees of the teachers' retirement system (§238.03(9)).

31. Institute proceedings in the name of the state for the purpose of recovering moneys due the state from any medical scholarship recipient (§239.61).

32. Represent board of control in eminent domain proceedings (§240.171).

33. Conduct procedure for and act as counsel for board of commissioners of state institutions in condemnation of property as provided (§242.58).

34. Act as legal adviser and representative of the board of trustees of the Florida state fire college (§242.61).

35. Approve bonds given by institutions receiving bodies to anatomical board (§245.14).

36. Conduct condemnation proceedings on behalf of the armory board (§250.40).

37. Act as ex officio member and legal adviser of the state civil defense counsel (§252.05).

38. Pass upon and approve regulations of district drainage board (§298.53).

39. Act as legal adviser for the state road department. (Said department, however, has a special attorney authorized by statute.) (§§334.171, 334.18).

40. Act as attorney for the public service commission (this work is negligible because of the fact that the public service commission has authority to employ its own special counsel) (§§350.29, 350.30, 350.31, 350.62, 350.66).

41. Assist public service commission in making investigations relating to the regulation of private wire service (§§365.06, 365.07).

42. Attend to all legal business arising in connection with the laws governing the salt water fishing industry and state board of conservation (§370.021(6)).

43. Represent the state in all appeals from judgment of forfeiture to the supreme court (§372.316).

44. Enforce the vital statistics law (§382.37).

45. Represent hospital licensing agency (§395.16).

46. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§447.10).

47. Assist in the enforcement of the basic science law (§456.22).

48. Assist in the enforcement of laws regulating the practice of optometry (§463.19).

49. Institute proceedings in the name of the state for the purpose of recovering moneys due the state from any dental scholarship recipient (§466.45).

50. Represent the state board of architects in judicial proceedings to which the board may be a party. However, the board is authorized

by statute to secure other legal advice or service (§467.14).

51. Approve the form for bonds of nonresident outdoor advertisers (§479.06).

52. Act as legal adviser to the state board of dispensing opticians (§484.08).

53. Act as legal adviser and represent watchmakers commission in all courts and in all legal matters affecting commission (§489.10).

54. Act as legal adviser to board of registration for foresters (§492.19).

55. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).

56. Assist in the enforcement of laws regulating small loan businesses (§516.23).

57. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

58. Assist in enforcement of law regulating sale of liquid fuels (§526.10).

59. Investigate and rectify commercial discriminations (§§540.02-540.05).

60. Investigate contracts obstructing competition in violation of fair trade law (§541.01).

61. Enforce the antitrust laws of the state (§542.03).

62. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

63. Prosecute combinations against Florida meats (§544.02).

64. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).

65. Act as attorney for the state racing commission. (Said commission, however, has statutory authority to employ its special counsel) (§550.01).

66. Represent state in all appeals from judgments of forfeiture (§562.404).

67. Act as counsel for the department of agriculture (§570.10).

68. Act as legal adviser to the soil conservation board. (Said board, however, has statutory authority to employ its special counsel.) (§582.09).

69. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).

70. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).

71. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

72. Institute and prosecute to final judgment such legal or equitable proceedings as may be advisable to revoke permit, prevent its improper use or prevent foreign corporation from exercising corporate powers within state (§§617.022, 617.11).

73. Bring proceedings to test the validity of the incorporation of cooperative marketing associations and nonprofit cooperative associations (§§618.23, 619.09).

74. Bring proceedings to dissolve professional service corporation because of legal disqualification of officer, shareholder, agent or employee (§621.10).

75. Represent the insurance commissioner in connection with insurance matters (§632.541).

76. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§660.08).
77. Bring proceedings to recover escheated property (§731.33).
78. Bring proceedings to forfeit prize money in lotteries (§849.12).
79. Represent state in appeals from judgments of forfeiture of gambling devices to the supreme court (§849.42).
80. Enforce laws regarding subversive activities (§876.27).
81. Conduct extradition hearings for the governor (§941.04).
82. Act as attorney for the parole commission (§947.11).
83. Act as legal adviser to department of corrections (§944.52).
84. Furnish legal services to division of mental health (§965.01).
85. Conduct condemnation proceedings on behalf of the board of commissioners of state institutions and on behalf of the adjutant general's office for military purposes (§965.061).
86. Furnish legal services to board of commissioners of state institutions in their protection of financial interests of the state with respect to claims for care and maintenance of patients of state institutions (§965.08).
87. Bring suits to collect expenses for mentally ill or insane persons (§965.08).

MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. State board of pardons (§12, Art. IV, Fla. Const.).
2. Antiquities board (§267.02).
3. Department of motor vehicles (§318.011).
4. Board of commissioners of state institutions (§17, Art. IV, Fla. Const.).
5. Governor's cabinet (§20, Art. IV, Fla. Const.).
6. State board of education (§3, Art. XII, Fla. Const., §229.012).
7. Interstate cooperation commission (§13.05).
8. Government reorganization committee (§13.80).
9. Sheriff's bureau (§30.36).
10. Board of appeals of county officers' budgets (§30.49).
11. Judicial council (§43.15).
12. State canvassing board (§102.111).
13. State merit system personnel board (§110.02).
14. Public records screening board (§119.04).
15. Railroad assessment board (§195.001).
16. Revenue commission (§213.02).
17. State budget commission (§216.01).
18. State board for vocational education (§229.061(9)).
19. State textbook purchasing board (§233.13).
20. State board of trustees of teachers' retirement system (§238.03).
21. State civil defense council (§252.05).
22. Trustees of internal improvement trust fund (§253.02).
23. State purchasing commission (§287.031).
24. State board of drainage commissioners (§298.69).
25. Department of public safety executive board (§321.01).
26. State board of conservation (§370.02(1)).
27. Boating council (§371.032).
28. Outdoor recreational development (§375.021).

29. State housing board (§424.04).
30. Florida securities commission (§517.03).
31. Board of fixing values of investment securities of trust companies (§660.08).

STATUTORY REVISION DEPARTMENT

The 1943 legislature created a permanent statutory revision, legislative, drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., F. S.). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

Continuing plan of operation.—The statutory revision department operates, as directed under the statutes (see §§16.19-16.24, 16.27, 16.43, 16.44, 16.46-16.48, 16.50, 16.51, F. S.), to the fullest extent and according to the intent and purpose of said statutes, its work being carried forward in a continuous manner and in the following objective classification:

(1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies, eliminating redundances and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by reviser's bills to be submitted to each session of the legislature.

(2) Carrying on the arrangement and identification of the general statutes and laws of this state as adopted in Florida Statutes, by adding, in the proper place, all new matter belonging therein; this material is compiled, revised and published biennially and adopted by each session of the legislature as the official Florida Statutes.

(3) Preparing and having printed from time to time pamphlets, special indexes and other materials relating to statutes and laws; securing copyrights and republishing when necessary.

(4) Carrying on a continuous reworking of the general index to the Florida Statutes in order that said index may be improved with each biennial publication.

(5) Indexing the general laws of each legislative session that are to be incorporated in the Florida Statutes. This material is indexed in the light of the existing general index so that the new material will fit into the existing pattern of said general index.

(6) Making a complete biennial revision of the general statutes and laws of this state to conform with the numbering system, style, contents and other characteristics of the Florida Statutes.

(7) Maintaining a bill drafting department for the benefit of the members of the legislature and the state officials, boards and agencies.

(8) Maintaining a legislative reference library in conformance with legislative authorization.

(9) Preparing, compiling and having printed such handbooks, and other publications of the attorney general as may be required by law or that in the opinion of the attorney general is deemed advisable.

(10) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(11) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

Preservation of type used.—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

Selection and supervision of personnel.—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision and control is under the attorney general, who, under authority of §16.43, F. S., selects a director. The director has the direct supervision and control of the department, and with the advice of the attorney general selects and employs the operating personnel and fixes their compensation.

(2) Principal study of the statutes, revisions and preparation of reviser's bills is under the supervision of the director.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the director.

(4) Related work is kept up to date under the supervision of the director.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the director.

The reviser's bills, as provided by statute, are prepared by the director and the department under his direction. The principal objectives of the reviser's bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation of jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes.

In the compilation of material and the drafting of reviser's bills, the following rules and procedures are adhered to:

(1) A continuing and systematic study of the statutes is carried on.

(2) A careful search is made for:

(a) Inappropriateness of run-in lines to sections.

(b) Misspelled words and poor punctuation.

(c) Statutes limited as to time of operation and which have expired.

(d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.

(e) Laws that have become obsolete.

(f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.

(g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.

(h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.

(i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.

(j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.

(k) Conflicting powers and duties of officials.

(l) Repetitious statutes.

The department carries continuing history notes on each section of the statutes; maintains a running file containing a list of errors, suggestions, etc., that are submitted by members of The Florida Bar; and maintains a system of keeping comprehensive notes and data for the final preparation of the reviser's bills. In the preparation of reviser's bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verboseness and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

Printing.—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided.

COMPILED STATEMENT OF CASES HANDLED, OPINIONS AND MISCELLANEOUS LETTERS WRITTEN IN THE ATTORNEY GENERAL'S OFFICE

(From Jan. 1, 1965 through Dec. 31, 1966)

CRIMINAL CASES

January 1, 1965—Cases pending		996
1965—New cases—Tallahassee	—446	
Lakeland	—308	
Miami	—420	1,174
1966—New cases—Tallahassee	—493	
Lakeland	—244	
Vero Beach	—369	
Miami	—450	1,556
TOTAL		3,726
Closed cases—1965	—1,201	
Closed cases—1966	—1,098	2,299
January 1, 1967—Cases pending		1,427

CIVIL CASES

January 1, 1965—Cases pending		584
1965—New cases—Tallahassee	—310	
Miami	—144	
Tampa	— 43	497
		1,081
1966—New cases—Tallahassee	—515	
Miami	—105	
Tampa	— 41	
(1965-1966)		661
TOTAL		1,742
Closed cases—1965	—655	
Closed cases—1966	—455	1,110
January 1, 1967—Cases pending		631

1965—Opinions	141		
1966—Opinions	111		252
1965—Subjects	185		
1966—Subjects	118		303
1965—Miscellaneous letters (Main Office)		12,240	
(Statutory Revision)		13,517	
(Down State)		4,610	
1965—Invitations included (Faircloth)		1,689	
			32,056
1966—Miscellaneous letters (Main Office)		13,850	
(Statutory Revision)		11,340	
(Down State)		4,185	
1966—447 Invitations included (Faircloth)		2,011	
			31,386

Mailing List (Opinions)

1965—Opinions	27,068	
1966—Opinions	25,371	
TOTAL		52,439

Mailing List (Digest)

1965—Digest	14,400	
1966—Digest	14,575	
TOTAL		28,975

Extraditions

1965—Approved	624
1966—Rejected	25

Statutory Revision

(Miscellaneous Letters)

1965	13,517	
1966	11,340	
TOTAL		24,857

INDEXES
and
CITATORS

OMITTED OPINIONS BY NUMBER AND SUBJECT MATTER

1965-1966*

	Opinion
BAY COUNTY; superintendent of public instruction; salary increase, status	066-47
BOARD OF REGENTS; selection and appointment, terms, etc.; confirmation	065-18
DISTRICT COURTS OF APPEAL; fourth district, emergency appropriation to facilitate administration of court	065-121
ECONOMIC OPPORTUNITY ACT; implementation; technical assistance and related services; authority of governor	065-30
FAIR ASSOCIATIONS; municipal license tax fees; application	065-88
GOVERNOR; economic opportunity act, implementation; technical assistance and related services; authority	065-30
MUNICIPALITIES; fair associations, municipal license tax fees, application	065-88
NORTH ST. LUCIE RIVER DRAINAGE DISTRICT; officers and employees, retirement system, eligibility to participate	066-87
RETIREMENT SYSTEMS; state and county officers and employees; north St. Lucie river drainage district, officers and employees; eligibility	066-87
SCHOOLS; millage increases for school purposes, real and tangible property; construction of §193.05, F. S., as amended	065-35
TAXATION; millage increases for school purposes, real and tangible property; construction of §193.05, F. S., as amended	065-35

* A copy of any opinion omitted from this report is on file in this office.

GENERAL INDEX

—A—

	Opinion	Page
ABANDONED PROPERTY; state universities, personal property abandoned on grounds of; disposition	066-97	378
ACCIDENTS; county-owned motor vehicles involved in accidents; authority of county employee to disclose details	065-23	34
ACTIONS; condemnation actions, service of pleadings in; sheriff's fee	066-19	254
ADMINISTRATION, STATE BOARD OF; statutory investment authority; investment of certain state agencies' funds; limitations	065-48	68
AERIAL OR RADAR SURVEILLANCE; highway speed violations; use of patrol plane detection for purpose of blocking speeds of vehicles; legality of arrest by another chase officer on ground	066-98	378
AIRCRAFT; highway speed violations; use of patrol plane detection for purpose of clocking speeds of vehicles; legality of arrest by another chase officer on ground	066-98	378
ALCOHOLIC BEVERAGES AND LIQUORS		
Beverage department, cigarette tax illegally paid to municipalities; refund required	066-16	245
County prosecuting attorney; engagement in sale of beverages prohibited	065-73	102
County zoning; effect of regulations on businesses holding liquor licenses within area	065-56	78
AMBULANCE SERVICE; executive order authorizing counties to provide; governor, without authority	066-37	286
AMELIA ISLAND MOSQUITO CONTROL DISTRICT; state and county retirement system, eligibility of officers and employees to participate	066-101	385
ANTIQUE SHOWS; junior museum; incidental sales; license requirements	066-36	285
APPORTIONMENT; congressional or legislative districts, census based upon	065-28	40
APPROPRIATIONS; state agencies' contracts; expenditure of funds involved beyond legislative biennium; legality	066-90	368
ARCHITECTS; public lodging or public food service establishment; erection or remodeling; plans and specifications, approval	066-51	306
ARRESTS		
Police officers, arrest authority without warrant at scene of accident; transfer to appropriate trial court	065-26	37
Shopping centers; arrest in accident cases occurring on privately owned property of centers outside city limit; authority of department of public safety	066-59	318

	Opinion	*Page*
ARRESTS (Cont.)		
Speed violations; use of patrol plane detection for purpose of clocking speeds of vehicles; legality of arrest by another chase officer on ground	066-98	378
ASSESSMENTS; method of fixing millage; problems arising because of §193.03, F.S., as amended; section construed	065-90	125
ATTORNEYS AT LAW; fees', probate matters; petition or order of court on fees necessary	065-74	103
AUDITING DEPARTMENT, STATE		
Auditor's work papers, interoffice correspondence on items under examination, etc.; not considered public records	066-88	363
Fire control district; post-audit of financial accounts and records; state auditor without authority	066-91	369
—B—		
BAIL BONDS; forfeiture; violation of municipal ordinances; clerk of circuit court, entering of judgment; power	066-106	394
BAIL BONDSMEN; defendant, appearance; continuation in excess of 72 hours; notice by clerk	065-111	163
BANKS AND TRUST COMPANIES		
Bonds issued by international banks for reconstruction and development; eligible for investments	065-123	184
Checks, endorsement of, etc., payable to deceased officers; procedure for payment	065-6	8
Holidays; closing or opening of banks under certain conditions	065-124	186
Money orders, travelers checks, etc., sale of; construction of section re minimum requirements	065-80	112
Worthless checks		
Cases involving certain amount; prepayment of costs	065-87	123
Dismissed cases, etc.; payment of judge's fees; other misdemeanor cases	065-116	174
BARBERS; military installations, practice of out-of-state barbers; time not counted toward apprenticeship requirements	065-17	25
BARBITURATE LAW; pharmacist, possession of barbiturates in professional capacity but for personal use; exemptions	065-105	154
BATHING CAPS; used for recreational purposes, subject to wholesale sales tax	066-23	263
BIDS, COMPETITIVE		
Aerial photographic maps and data in connection with reassessment program; bids not required	066-9	233
Purchasing commission, prices available to counties and others	066-94	374

	Opinion	Page
BIDS, COMPETITIVE (Cont.)		
Sealed envelopes containing "no bid," whether in compliance with laws	066-102	388
BINGO; guest, game of; contest similar to bingo; constitutes gambling	066-14	241
BOARD OF ADMINISTRATION, STATE See: ADMINISTRATION, STATE BOARD OF		
BOARD OF EDUCATION, STATE See: EDUCATION, STATE BOARD OF		
BOARD OF REGENTS		
Construction projects for board within city limits; occupational licenses not allowed	066-73	342
Florida state university; student body; bill of rights, adoption of certain proviso; without legal authority	066-30	276
Scholarship funds, use of, for student loans; matching federal funds to secure maximum moneys for student loans	066-31	278
State universities; authorized student entertainments; license permit not required	066-32	278
BOARDS OF COUNTY COMMISSIONERS See: COUNTY COMMISSIONERS		
BOARDS OR COMMISSIONS; state agency or board, compensation to a corporation where officer, employee or stockholder drawing salary fixed by law; payment authorized	066-92	370
BOATS AND BOATING; nonresident boats, navigating in navigable waters within corporate limits; municipal license tax; authority	065-7	9
BONFIRES; outdoor burning of leaves, hedges, papers, etc., in certain containers, whether violative of law	065-82	115
BORROWED FUNDS; special account placed by county commissioners; handling of by tax assessor; legality	066-9	233
BOWLING TOURNAMENT; payment of monetary consideration for privilege of entering; valuable prize awards for exercise of skill; does not violate gambling laws	066-41	292
BUDGET; sheriff's budget, jurisdiction of county commissioners upon failure to act prior certain date	066-85	359
BUDGET COMMISSION, STATE		
Citrus commission; group insurance for employees; budget commission approval	066-28	272
Department of welfare; day care and other workshops; consultants; use of welfare funds; approval	065-117	175
BUILDING FUND, COUNTY; millages levied under §135.01, F.S., application of rollback tax provision	066-84	358
BUILDING PERMITS; public buildings; authority of city to require approval of plans by architect as prerequisite to issuance of building permit	066-58	316

—C—

	Opinion	Page
CAMPAIGN GIVE-AWAYS See: ELECTIONS		
CANDIDATES FOR PUBLIC OFFICE See: ELECTIONS		
CAVEATS; filing by state agencies; duties of county judge, fee required	065-86	121
CENSUS		
Apportionment; congressional or legislative districts, census based upon	065-28	40
Population acts, effect of special census	065-2	3
CENTRAL AND SOUTHERN FLOOD CONTROL DISTRICT		
Advance travel expense, officers and employees; §112.061, F.S., applicable	066-105	392
Budget; governing board authority to amend or deviate therefrom after it's final adoption	066-105	392
Rollback taxes, provisions not applicable to district	066-79	350
Vacation time, compensation of employee, employed on a bi-weekly payroll period	066-105	392
CHARITABLE INSTITUTIONS; leasehold interest held and used by for certain period of time; tax situs	065-46	63
CHATTEL MORTGAGE; sale of intangible personal property under court order; affect of sale on existing mortgage	066-111	401
CHECKS		
See also: BANKS AND TRUST COMPANIES		
Worthless checks		
Cases involving certain amount; prepayment of costs	065-87	123
Dismissed cases, etc.; payment of judge's fees; other misdemeanor cases	065-116	174
CHILD TRAINING SCHOOLS; juveniles committed to; fingerprinting; authority of school; exception	065-33	46
CHIROPRACTIC		
Applicants to practice; additional qualifications under amended law	065-67	95
Letters written to patients and certain persons relating to certain services offered; whether act considered advertising	066-74	343
CIGARETTE TAX; municipalities, illegal payments to; refund required	066-16	245
CITRUS; prisoners, use of in harvesting citrus and vegetables; unauthorized activity	065-31	43
CITRUS COMMISSION, FLORIDA; group insurance for officers and employees, participation in payment in premiums for; budget commission approval	066-28	272

	Opinion	Page
CITRUS COUNTY PORT AUTHORITY; members; governor to issue commission for four years in place of office designated five years	066-95	375
CIVIL AIR PATROL		
Florida wing; employees not within purview of state or county retirement law	065-3	3
Properties purchased by certain funds, status of tile	065-3	3
CLERKS, CIRCUIT COURTS		
Bail bondsmen; defendant, appearance; continuation in excess of 72 hours; notice by clerk	065-111	163
Commercial code, records of certain transaction; recording	066-52	307
Garnishment; attorney's fee deposited into registry of court; fee	065-95	137
Municipal court, forfeiture of bail; entering of judgment, authority	066-106	394
COMMERCIAL CODE		
Assignment of a security interest, carbon or xerox copy; accepted for record under certain conditions	066-52	307
Chattel mortgages and similar pre-code documents evidencing security interests in personalty; recording	066-52	307
Credit union; secured transactions between credit union and its members; excluded from general commercial statute	066-50	305
Excise tax on documents applicable to transactions under code; records, etc.	066-52	307
Financing statements listing fixtures as collateral; record of mortgages or official records; recording	066-52	307
Records of certain transactions under code; recording	066-52	307
Secured transactions effected prior to effective date of code; certificate of renewal or continuance, filing	066-104	390
COMMISSION ON TAX REFORM, FLORIDA; members and employees, per diem and subsistence allowance	066-11	234
COMPETITIVE BIDS See: BIDS, COMPETITIVE		
COMPTROLLER; valuation errors resulting in millage errors and reduced tax moneys; publication of notice; cost, payment	065-137	203
CONDEMNATION; service of pleadings in action of; sheriff's fee	066-19	254
CONGRESSIONAL DISTRICTS; apportionment; congressional or legislative districts, census based upon	065-28	40
CONSERVATION, STATE BOARD OF		
Coastal construction; privately owned property; board's authority to regulate	065-119	180
Flood control and water management districts; title to lands acquired for	065-72	101
Oysters from natural bars within city limits, taking; jurisdiction	065-118	178
Salt water fisheries; validity and operation of Ch. 370, F.S., and laws relating to	065-38	51

	Opinion	Page
CONSTABLES		
Docket book for executions, duty to maintain	065-44	60
Executions, levy of; powers	065-44	60
CONTESTS; operation; monetary consideration; valuable prize awards; whether violative of law	065-139	208
CONTRACTS		
Class "A" and "B" printing, relating to legislature, defined	065-10	13
Preneed funeral service contract; bank deposit agreement; withdrawal under certain conditions	065-53	74
Purchase order, assigning of certain state funds due under order to third parties; permitted	066-107	396
Retail installment sales contracts See: RETAIL INSTALLMENT SALES CONTRACTS		
School board; failure of contractor to complete contract; waiver of penalty; authority of board	065-110	162
State agencies; expenditure of funds involved beyond a legislative biennium; legality	066-90	368
Teachers' continuing contracts See: Teachers under SCHOOLS		
CORPORATIONS		
Foreign corporations; qualification to do business in state required before given contracts to supply commodities to state institutions	066-93	373
Private schools or nonprofit corporations; cooperative educational services; restrictions	065-135	201
Process, service by corporations; unauthorized	066-66	328
Religious corporations and organizations, domestic or foreign; ad valorem tax, exemption	066-17	247
COSMETOLOGY LAW		
Manicurists and pedicurists, limitations of practice	065-85	120
Rules and regulations adopted by board; state board of health approval required	065-131	196
School of cosmetology in operation prior to adoption of new law; surety bond, filing	065-60	83
COUNTIES		
Murphy act lands, state-owned, taxed by; prohibited	065-140	212
Purchasing commission competitive bids; prices available to counties and others	066-94	374
Special road and bridge districts		
County taxes collected within districts; expenditures of funds	065-8	10
Plans and specifications of districts, maintenance and reconstruction; departure from original	065-8	10
COUNTY BOARDS OF PUBLIC INSTRUCTION		
Budget, preparation; employment of expert without consulting superintendent; legality	065-108	159
Buses, school; purchase for amount in excess of appraised value unauthorized	065-93	132
Classroom teachers' association, professional negotiations agreement with; authority of board	065-138	207
Committees composed of teachers; policies affecting certificated personnel; authority of school board	066-46	300

	Opinion	Page
COUNTY BOARDS OF PUBLIC INSTRUCTION (Cont.)		
Consolidated high school, Franklin county; location	065-136	202
Contract, failure of contractor to complete project; no damage suffered; authority of board to waive penalty	065-110	162
Exceptional children, education of; requirement	066-99	383
Eye protective devices, extent as to the use under certain conditions	065-134	200
Instructional personnel, terminal pay by board; authorized	066-54	311
Insurance		
Liability contract, jurisdiction of court	065-97	139
School plants and contents; type required	066-65	327
Junior colleges		
Food service programs, control and administration	066-77	348
Radio-active materials used for instructional purposes; insurance coverage against bodily injury and property damage; premium payments, authorized	066-20	255
Members		
State and county retirement		
Expense payments only; eligibility	066-110	399
Retroactive service credit, eligibility requirements	066-110	399
Mentally retarded children, education of; requirement	066-99	383
Millage; effect of §§193.03 and 193.031, F.S. as amended, on the millage voted at 1965 general election	065-130	194
Millage elections		
Majority vote not received by any millage voted on; how vote determined	065-130	194
School board, power to fix millage in excess of the voted millage	065-130	194
Neighborhood youth corps; economic opportunity act; student employees, workmen's compensation, eligibility	065-99	142
Officer or employee of board; self-organization of school committee, requirements; powers of board	066-46	300
Private schools or nonprofit corporations; cooperative educational services; restrictions	065-135	201
Privately owned vehicles used on official business; basis for reimbursement of transportation cost of persons traveling	066-63	324
Public funds; use for purchase of certain materials to distribute information re school systems and proposed millage; authority	065-106	156
Pupils, withhold transfer of records, refusal for failure to pay for lost books or damaged material; board without authority	066-5	223
Purchases by person not recommended or supervised by county superintendent; board without authority; procedure for	066-33	279
Reassessment programs taken prior certain date; millage reduction; construction of §193.03, F.S., as amended	065-83	355

	Opinion	Page
COUNTY BOARDS OF PUBLIC INSTRUCTION (Cont.)		
Salary schedules		
Bus drivers in excess of number recommended by school transportation survey, unauthorized	065-93	132
Instructional personnel; salary differentials based on certain tests; authority of board	066-1	216
School buses; insurance, liability; school boards; limitation of liability	066-100	384
Schools		
Construction; race track funds and issuance of revenue certificates; authority of board	066-3	219
Districts, millage established at millage election; applicability of mandatory rollback provisions of §193.30, F.S.	066-70	337
Plants and contents, type of insurance required	066-65	327
Property; purchase for amount in excess of appraised value, unauthorized	065-93	132
Teachers, personal leave to attend legislative session; granting of; compensation	066-24	265
Textbooks, lost or destroyed by students, withhold transfer student records; board without authority	066-5	223
Tort actions, insurance coverage; jurisdiction of court	065-97	139
Travel expenses for members		
Official business; transportation by chartered vehicles; reimbursement of cost	066-63	324
Payment allowed	065-13	20
Vice-chairman, properly bonded; school warrants or other legal documents; conditions for signing	066-29	275
Zoning ordinances, city of Miami; school sites; effect and validity of ordinances	066-10	234
COUNTY BOARDS OF TAX EQUALIZATION; tax valuations; powers and duties of boards	066-86	361
COUNTY COMMISSIONERS		
Borrowed funds placed in special account; handling of, by tax assessor; legality	066-9	233
Coastal construction; privately owned property; board's authority to regulate	065-119	180
County zoning; effect of regulations on businesses holding liquor licenses within area	065-56	78
Mileage travel expenses for official business; limitations	066-83	355
Public employees engaged in eradication of mosquitoes; furnishing protective uniforms; authority	065-101	146
Sheriff's budget; jurisdiction of commissioners upon failure to act prior certain date	066-85	359
Shore and beach preservation; setback lines, creation; authority	065-119	180
Water and sewer systems; county-wide plan for construction; federal aid, acceptance by county; authorized	066-26	268
COUNTY HEALTH UNIT BUDGET; millage rollback provisions, application of county's portion	066-84	358
COUNTY JUDGE-COUNTY JUDGE'S COURT		
Caveats, filing, etc.; duty of judge; fee required	065-86	121

	Opinion	Page
COUNTY JUDGE-COUNTY JUDGE'S COURT (Cont.)		
Criminal proceedings; county judge's fee in certain pending cases subsequent to amended law	065-70	99
Judge, eligibility to receive back pay for services rendered as judge of county court; permitted	066-108	396
Noncapital felony, person charged with; determination of insolvency and representation; authority	065-29	42
Worthless checks; dismissed cases, etc.; payment of judge's fees; other misdemeanor cases	065-116	174
COUNTY OFFICERS AND EMPLOYEES		
Accidents involving county-owned motor vehicles; authority of county employee to disclose details	065-23	34
Public employees engaged in the eradication of mosquitoes; furnishing protective uniforms; authority of county commissioners	065-101	146
Retirement See: RETIREMENT SYSTEMS		
COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION See: SUPERINTENDENT OF PUBLIC INSTRUCTION, COUNTY		
COUNTY TAX ASSESSOR See: TAXATION		
COURT REPORTER; privately employed by nonindigent defendant or his attorney; criminal cases; payment of expense	066-67	329
COURTS		
Defendant, safekeeping; authority of trial court to order nonconvicted defendant to state prison	065-9	12
Proceedings supplementary to execution of §§55.52-55.611, F.S.; small claims court judge, powers	066-103	389
Traffic offenses, court having jurisdiction over; suspension of driver's license, authority of court	065-79	110
CREDIT UNIONS		
Interests and deposits, intangible tax; property tax situs	066-82	354
Secured transactions between credit union and its members; excluded from general commercial statute	066-50	305
CRIMINAL CASES		
County judge; fees in certain criminal proceedings pending subsequent to amended law	065-70	99
Court reporter, privately employed by nonindigent defendant or his attorney; payment of expense	066-67	329
Defendant, safekeeping; authority of trial court to order nonconvicted defendant to state prison	065-9	12
Metropolitan court judges; authority as committing magistrates; offenses against state criminal laws	065-96	137
Noncapital felony, person charged with; determination of insolvency and representation; authority of judge	065-29	42
Worthless checks		
Cases involving certain amount; prepayment of costs	065-87	123
Dismissed cases, etc.; payment of judge's fees; other misdemeanor cases	065-116	174

	Opinion	Page
CRIMINAL COURTS OF RECORD; Dade county; additional judges; creation only by legislative act	065-37	48

—D—

DADE COUNTY		
Criminal court of record and juvenile court, additional judges; creation only by legislative act	065-37	48
Metropolitan court judges; authority as committing magistrates; offenses against state criminal laws	065-96	137
DATA PROCESSING OR SIMILAR EQUIPMENT; located within state, used by owners or lessees; subject to tax	065-47	65
DECEASED STATE OFFICERS; checks, endorsement, etc., payable to; procedure for payment	065-6	8
DECEDENT'S ESTATES; attorney fees; probate matters; petition or order of court on fees necessary	065-74	103
DEFENDANTS		
Bail bondsmen; appearance; continuation in excess of 72 hours; notice by clerk	065-111	163
Court reporter, privately employed by nonindigent defendant or his attorney; payment of expense	066-67	329
Released on own recognizance; cash bond; notice by clerk not required	065-111	163
Safekeeping; authority of trial court to order nonconvicted defendant to state prison	065-9	12
DEPARTMENT OF EDUCATION See: EDUCATION, DEPARTMENT OF		
DEPARTMENT OF PUBLIC SAFETY; arrest in accident cases occurring in shopping centers outside municipal boundaries on private property; authorized	066-59	318
DEPARTMENT OF PUBLIC WELFARE See: WELFARE		
DIVISION OF CORRECTIONS; prisoners, use of in harvesting citrus and vegetables; unauthorized activity	065-31	43
DOCUMENTARY STAMP TAX		
Commercial code, records of certain transaction; recording	066-52	307
Documents executed and delivered in other states and brought into Florida; status	065-76	105
Federal government, conveyance of real property to; tax situs	065-69	97
Mortgages, out-of-state; existing notes and obligations; class C intangible tax; tax status	066-25	266
Trade acceptances; as known in mercantile field; payments; tax exempt	066-18	251
DOCUMENTS		
Executed and delivered in other states and brought to Florida; stamp tax status	065-76	105

	Opinion	Page
DOCUMENTS (Cont.)		
Motor vehicle documents, use of facsimile signature by attesting officer; commissioner not to accept for filing	065-5	7
DRIVERS' LICENSES; traffic offenses, court having jurisdiction over; suspension of driver's license, authority of court	065-79	110
DRUG STORES; use of word "drugs" by firms operating without permit prohibited	065-50	69
DRUGS; interns or unlicensed physicians; prescribing drugs or writing prescriptions unauthorized	065-71	99
DRUNKEN DRIVERS; "actual physical control" of vehicle while under influence of liquor or drugs; what constitutes	066-69	331
DUVAL COUNTY; teachers; tenure employment; precludes issuance of contract for fifth probationary year	066-72	341
—E—		
ECONOMIC OPPORTUNITY ACT; neighborhood youth corps sponsored by school board; student employees, workmen's compensation, eligibility	065-99	142
EDUCATION; institute for continuing university studies, limitation and restrictions on total staff	065-24	35
EDUCATION, DEPARTMENT OF; salary of employee, budgeted amount not available; adjustment at later date; legality of payment	065-36	48
EDUCATION, STATE BOARD OF		
Junior colleges, vocational-technical centers; earmarked funds; establishment of priorities; powers	065-94	133
Private schools, prescribing standards for classification and accreditation; without authority	066-12	238
School construction, municipal regulations relating to fire prevention; requirement of school officials to meet standards	065-81	113
Teaching certificates, revocation or suspension; authority under certain conditions	065-4	5
Testing service, authority of board to refuse to accept score under certain conditions	065-4	5
EDUCATIONAL INSTITUTIONS		
Leasehold interest held and used by for certain period of time; tax situs	065-46	63
Rentals derived from; application of rule in Simpson v. Bohon case; tax situs	065-22	30
EDUCATIONAL TELEVISION COMMISSION; official activities of, as it may apply to development of educational television; legal scope; approval	066-21	256

	Opinion	Page
ELECTIONS		
Bond elections, closing of registration books prior to	065-100	144
Campaign give-aways by candidates for public office; use of, authorized	066-35	283
Candidates		
Death of; on date of second primary election; procedure to follow	066-62	322
Omission in qualification papers subsequent to qualifying deadline; correction prohibited	066-64	325
Public office, use of certain campaign give-aways; authorized	066-35	283
Qualification papers; correcting omission subsequent to deadline; prohibited	066-64	325
Death of candidate on date of second primary election; procedure to follow	066-62	322
Electors; school millage and trustee elections; qualification	065-114	169
Freehold status of person holding 99 year lease; not eligible to qualify as a freeholder elector	066-38	289
Identification registration card, use of facsimile signature by supervisor of elections; procedure	065-104	152
Registration books, closing prior to bond election	065-100	144
School millage elections		
Electors, qualifications to participate	065-114	169
Majority vote not received by any millage voted on; how vote determined	065-130	194
Millage rollback provisions, affect of §193.03, F.S., as amended	065-112	164
School board, power to fix millage in excess of the voted millage	065-130	194
Use of voting machines; write-in votes; procedure	065-109	160
School trustee elections; electors, qualifications to participate	065-114	169
Supervisor of elections; use of facsimile signature on registration identification cards; procedure	065-104	152
Voting machines; school district millage election; write-in votes; procedure	065-109	160
EMINENT DOMAIN		
Amendment of §74.05, F.S., construed; repealed by enactment of §§74.051 and 74.121, F.S.	066-57	315
Service of pleadings in action of; sheriff's fee	066-19	254
EXCEPTIONAL CHILDREN; Education of See: SCHOOLS		
EXECUTIONS; constables, power to levy upon goods pursuant to writ	065-44	60
EXECUTIVE OFFICERS; salaries, fixing and establishing; legislative act required	065-39	53
EXTRA SESSION See: LEGISLATURE		
EYE PROTECTIVE DEVICES		
Art students, junior and senior classes; use of devices under certain conditions	065-134	200
Schools, extent as to the use of devices under certain conditions	065-134	200

Opinion Page

—F—

FACSIMILE SIGNATURE
Motor vehicle documents; use by attesting officer; commissioner not to accept for filing ____ 065-5 7
Supervisor of elections, use on registration identification cards; procedure ____ 065-104 152

FELONY; noncapital felony, person charged with; determination of insolvency and representation; authority of judge ____ 065-29 42

FINGERPRINTS AND FINGERPRINTING
Child training school, commitment; authority of school to fingerprint juveniles; exception ____ 065-33 46
Juveniles; as prerequisite to employment by prospective employer; authorized ____ 066-44 296
Minors not in custody of juvenile court or any law enforcement agency; consent from parent or guardian required ____ 066-2 217

FIRE CONTROL DISTRICT; post-audit of financial accounts and records by state auditor; without authority 066-91 369

FIRE MARSHAL, STATE; outdoor burning of leaves, hedges, papers, etc., in certain containers, whether violative of law ____ 065-82 115

FLAGLER BEACH, TOWN OF; municipal judge, jurisdiction over juveniles violating laws within corporate limits ____ 065-63 88

FLOOD CONTROL AND WATER MANAGEMENT DISTRICTS; real property acquired with certain funds for district; title to lands ____ 065-72 101

FLORIDA CITRUS COMMISSION See: CITRUS COMMISSION

FLORIDA COMMISSION ON TAX REFORM; members and employees, per diem and subsistence allowance ____ 066-11 234

FLORIDA INLAND NAVIGATION DISTRICT See: INLAND NAVIGATION DISTRICT, FLORIDA

FLORIDA STATE GUARD; service in, creditable as service in organized militia; retirement ____ 065-129 192

FLORIDA STATE TURNPIKE AUTHORITY See: TURNPIKE AUTHORITY, FLORIDA STATE

FLORIDA STATE UNIVERSITY See: STATE UNIVERSITIES

FORFEITURE; bail bond, forfeited; violation of municipal ordinances; clerk of circuit court, entering of judgment; power ____ 066-106 394

FRANKLIN COUNTY; school construction; race track funds and issuance of revenue certificates; authority of board ____ 066-3 219

	Opinion	Page
FREEHOLDERS See: ELECTIONS		
FUNERAL DIRECTORS AND EMBALMERS		
New funeral establishment; operating and preparation room; license requirements	066-109	398
Prearrangements for funeral service in advance of need; bank deposit agreement; withdrawal under certain conditions	065-53	74
—G—		
GAINESVILLE, CITY OF; board of regents; construction projects for board within city limits; occupational licenses not allowed	066-73	342
GAMBLING		
Games of skill or contests, operation; monetary consideration; prize awards; whether violative	065-139	208
Golf or bowling tournaments; payment of monetary consideration for privilege of entering; valuable prize awards by exercise of skill; does not violate gambling laws	066-41	292
Guest, game of; contest similar to bingo; constitutes gambling	066-14	241
Parlor derby; horse race film; play money bets; prizes; whether violative	065-25	36
GAMES OF SKILL; operation; monetary consideration; valuable prize awards; whether violative of law	065-139	208
GARNISHMENT; registry of court, attorney's fee deposited into; clerk's fee	065-95	137
GASOLINE; stock in trade; gasoline and like products; measure of value; tax situs	065-98	139
GOLF TOURNAMENT; payment of monetary consideration for privilege of entering; valuable prize awards by exercise of skill; does not violate gambling laws	066-41	292
GOVERNOR		
Ambulance service, emergency; executive order authorizing counties to provide; without authority	066-37	286
Citrus county port authority, commission of; four year terms instead of designated five years	066-95	375
Motor vehicles owned by state road department for use of the governor; status	066-89	366
GRAND JURY		
Police officers		
Compensation allowed when appearing as witnesses before grand jury and prosecuting attorney	066-15	243
Witness fees and mileage when appearing before	065-126	190
GUEST, GAME; contest similar to bingo; constitutes gambling	066-14	241

	Opinion	*Page*
—H—		
HARVEST; prisoners, use of in harvesting citrus and vegetables; unauthorized activity	065-31	43
HAWKERS; nonresidents of county; engaged in business; permit requirement; validity of law	065-132	197
HEADSTART, PROJECT; Hillsborough county health department; kindergarten operation funding from project headstart; subject to regulations	065-128	191
HIGHWAYS		
Lost tag permit; use on motor vehicles; legality	065-64	90
Motor vehicles, unlawful axle weight; maximum fine on first one thousand pounds	065-59	82
Speed violations; use of patrol plane detection for purpose of clocking the speeds of vehicles; legality of arrest by another chase officer on the ground	066-98	378
HILLSBOROUGH COUNTY HEALTH DEPARTMENT; kindergarten operation, unding from project headstart; subject to inspecting and licensing regulations	065-128	191
HOMESTEAD EXEMPTION		
Applications for; list furnished to municipalities; duties of tax assessors	065-42	58
House trailers located on property of owner used as permanent home; tax situs	065-55	76
HOSPITALS, PUBLIC; osteopathic physicians practicing in; no law prohibiting such practice	066-34	281
HOTEL AND RESTAURANT COMMISSION; public lodging or public food service establishment; erection or remodeling; plans and specifications, approval	066-51	306
HOTELS; dining rooms, meals served to unregistered guests; permits, dancing to music or band, juke box, etc.; license requirements	066-60	319
HOUSE TRAILERS		
Highways, moving over to escape rising waters; obtaining of permit required	065-34	47
Located on property of owner, used as permanent home; tax situs	065-55	76
Permanently affixed to land and taxable as real property; certificate of title, surrendering for cancellation	066-56	314
Towed by motor vehicles over highways from one location to another; ad valorem tax situs	065-89	124
—I—		
INDIGENTS; hospital program, contribution of certain funds by trustees of Suwannee county hospital; legality	065-12	18
INLAND NAVIGATION DISTRICT, FLORIDA; conveyance of certain lands for recreational use, in spite of existing option and certain restrictions; validity of, 65-900, Laws of Florida	066-22	259

	Opinion	Page
INSTALLMENT LAND SALES ACT		
Classification as to collection of certain service charges	065-52	73
Lot reservation, payment by purchaser prior to inspection of property; whether or not contract executed	066-49	303
INSTITUTE FOR CONTINUING UNIVERSITY STUDIES; staff, personal services as well as persons paid salaries; limitation or restriction on total staff	065-24	35
INSURANCE		
Citrus commission; group insurance for employees; budget commission approval	066-28	272
County board of public instruction, insurance liability contract; jurisdiction of court	065-97	139
Foreign insurers, regional home office; substantial occupancy, defined	066-13	238
School plants and contents, type of insurance required	066-65	327
INTER-AMERICAN CENTER AUTHORITY; officers and employees; certain costs and expenses for promotional purposes; payment	065-40	55
INTERNAL IMPROVEMENT, TRUSTEES; artificial filling by sand material between groins; effect upon riparian ownership of the upland	065-14	21
INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT; bonds issued by; eligible investments for banks and trust companies	065-123	184
ITERNS OR UNLICENSED PHYSICIANS; prescribing drugs or writing prescriptions unauthorized	065-71	99
INVESTMENTS		
International bank for reconstruction and development, bonds issued by; eligible investments for banks	065-123	184
Retirement funds, investment in common stock, preferred or other interests in certain firms prohibited; legislative authority	065-16	24
State agencies; investment of certain agencies' funds by state administration board; limitations	065-48	68

—J—

JAI ALAI See: RACING		
JUDGES See: Specific court		
JUDICIAL OFFICERS; salaries, fixing and establishing; legislative act required	065-39	53
JUDICIAL RETIREMENT SYSTEM See: RETIREMENT SYSTEMS		
JUNIOR COLLEGES		
Fund, earmarked; establishment of priorities; state board of education, powers	065-94	133

	Opinion	Page
JUNIOR COLLEGES (Cont.)		
Radioactive materials used for instructional purposes; insurance coverage against bodily injury and property damage; premium payments, authorized	066-20	255
School food service programs, control and administration	066-77	348
Vocational-technical facilities at junior colleges; funds earmarked for vocational-technical centers not to be used for general purposes	065-94	133
JUNIOR MUSEUM; antiques, incidental sales of, at shows; license requirements	066-36	285
JUVENILE COURTS		
Child retained by police officers for purpose of interrogation and giving polygraph test; jurisdiction	066-44	296
Dade county; additional judges; creation only by legislative act	065-37	48
Fingerprinting of minors not in custody; consent from parent or guardian required	066-2	217
"Hold" order, issuance; return of juvenile offenders for further proceedings after detention; authority	065-115	172
Information obtained by certain officers in discharge of their duties; whether considered confidential and privileged	065-51	70
Juveniles		
Mental condition, conduct of hearing re; commitment; judge without authority	065-43	59
Violation of state and city laws; jurisdiction of municipal judge over juveniles within corporate limits	065-63	88
Record forms (JC 1), preservation and destruction	065-62	87
Reports filed by certain officers becoming part of court's records, whether considered confidential and privileged	065-51	70
JUVENILES		
Child training school, commitment; authority of school to fingerprint juveniles; exception	065-33	46
Fingerprinting as prerequisite to employment by prospective employer; authorized	066-44	296
State and city laws, violation of; jurisdiction of municipal judge over juveniles within corporate limits	065-63	88

—L—

LANDLORD; sale of intangible personal property under court order; affect of sale on landlord's lien	066-111	401
LEASEHOLD INTEREST; real property; procedure for imposition of taxes	065-20	27
LEAVE OF ABSENCE		
Military leave for service school purposes; eligibility for aggregate creditable service, retirement system	065-66	94
Teachers, personal leave to attend legislative session; granting of; compensation	066-24	265

	Opinion	Page
LEGISLATIVE ACTS; omission from chapter 65-487, §487.101, F.S.; legal effect	065-103	149
LEGISLATIVE DISTRICTS; apportionment; congressional or legislative districts, census based upon	065-28	40
LEGISLATURE		
Apportionment; congressional or legislative districts, census based upon	065-28	40
Class "A" and "B" printing, relating to legislature, defined	065-10	13
Extra session, convening of; business to transact; two-thirds vote clarified, etc.	065-61	84
Sales tax, local additional tax for school purposes; legality	065-49	69
Teachers, personal leave to attend legislative session; granting of; compensation	066-24	265
LICENSES AND LICENSE TAXES		
Antique show; junior museum; incidental sales; license requirements	066-36	285
Board of regents; construction projects for board within city limits; occupational licenses not allowed	066-73	342
Hotels; serving meals in dining room; permitting dancing either by band, juke box, etc.; license requirements	066-60	319
Motels; serving meals in dining room; permitting dancing either by band, juke box, etc.; license requirements	066-60	319
Newspaper vending machines, occupational license tax, requirement	066-75	345
Nonresident boats, navigating in navigable waters within corporate limits, municipal license tax; authority	065-7	9
Peddlers and hawkers, nonresidents of county; license requirements; validity of law	065-132	197
Private investigative or patrol agencies personnel employed by jai alai fronton; occupational license required	065-21	29
Public service establishments; addition of employees; additional license charges	066-42	294
Restaurants and dining rooms; permitting dancing either by band, juke box, etc.; license requirements	066-60	319
Salesmen engaged in real estate, occupational license tax; exemption	065-120	182
State universities; authorized student entertainments; traveling shows, etc.; permit requirements	066-32	278
LIENS		
Intangible personal property tax liens; ownership, release, etc.	065-58	80
Public defenders; liens made by; procedure for satisfaction; disposition of funds	065-122	183
Tax liens See: TAXATION		

	Opinion	Page
LOTTERY		
Games of skill or contests, operation; monetary consideration; prize awards; whether violative	065-139	208
Guest, game of; contest similar to bingo; constitutes gambling	066-14	241
Parlor derby; horse race film; play money bets; prizes; whether violative	065-25	36
—M—		
MANICURISTS; limitations of practice as required by Ch. 477, F.S.	065-85	120
MANPOWER DEVELOPMENT TRAINING ACT; salary of employee, budgeted amount not available; adjustment at later date; legality of payment	065-36	48
MAPS; aerial photographic maps and data in connection with reassessment program; bids not required	066-9	233
MARRIAGES		
Adopted children of different sexes adopted by same parents, marriage permitted	066-81	353
Incestuous marriages, prohibited	066-81	353
Natural child, marriage to child of opposite sex adopted by same parents, permitted	066-81	353
MENTAL HEALTH; juvenile court hearing to determine condition of child; commitment; without authority	065-43	59
METROPOLITAN COURT, DADE COUNTY; judges, authority as committing magistrates; offenses against state criminal laws	065-96	137
MIAMI, CITY OF; zoning ordinances; school sites; effect and validity of ordinances	066-10	234
MILITARY FORCES		
Barbers, out-of-state, practicing at military installations; time not counted toward apprenticeship requirements	065-17	25
Florida state guard service, creditable as service in organized militia	065-129	192
MILITARY LEAVE		
Continuing contracts or for allocation of minimum foundation funds, not counted as years of service toward	065-127	190
Service school purposes; eligibility for aggregate creditable service, retirement system	065-66	94
MILLAGE ELECTIONS See: COUNTY BOARDS OF PUBLIC INSTRUCTION; ELECTIONS		
MINERALS; subsurface rights; tax returns by owners; conveyance of, return by new grantee	065-41	56
MINORS; fingerprinting of minors not in custody; consent from parent or guardian, required	066-2	217

	Opinion	Page
MOBILE HOMES		
Annual license tax; period to begin license year	065-141	214
Permanently affixed to land and taxable as real property; certificate of title, surrendering for cancellation	066-56	314
Taxes		
Ad valorem or license; payment for years 1964-1965; refunds of taxes	066-6	224
Effect of constitutional amendment on §200.45, F.S.	066-7	227
MONEY ORDERS; sale of; construction of section re minimum requirements	065-80	112
MORTGAGES; out-of-state; existing notes and obligations; class C intangible tax; documentary stamp tax; tax status	066-25	266
MOSQUITO CONTROL DISTRICTS; public employees engaged in the eradication of mosquitoes; furnishing protective uniforms; authority of county commissioners	065-101	146
MOTELS; dining rooms, meals served to unregistered guests; permits, dancing to music of band, juke box, etc.; license requirements	066-60	319
MOTOR FUEL; stock in trade; gasoline and like products; measure of value; tax situs	065-98	139
MOTOR VEHICLES		
"Actual physical control" of vehicle while under influence of liquor or drugs; what constitutes	066-69	331
Axle weight, unlawful; maximum fine on first one thousand pounds	065-59	82
Business firms; incidental sales of used cars; dealer's license not required	066-40	292
Commissioner; duplicate license tag, duties re	065-64	90
County-owned motor vehicles involved in accidents; authority of county employee to disclose details	065-23	34
Documents, use of facsimile signature by attesting officer; commissioner not to accept for filing	065-5	7
Drunken drivers; "actual physical control" of vehicles, what constitutes	066-69	331
Emergency vehicles stopping for school buses, requirements	066-45	298
Highway speed violations; use of patrol plane detection for purpose of clocking the speeds of vehicles; legality of arrest by another chase officer on ground	066-98	378
House trailers		
Located on property of owner used as permanent home; tax situs	065-55	76
Moving over highways to escape rising waters; permit required	065-34	47
Towed by motor vehicles over highways from one location to another; ad valorem tax situs	065-89	124

	Opinion	Page
MOTOR VEHICLES (Cont.)		
License tags		
Duplicate tags; power of commissioner to issue	065-64	90
Lost tag permit; use for operation over highways; legality	065-64	90
Mobile homes and house trailers		
Annual license tax; period to begin license year	065-141	214
Attached to realty; certificates of title, surrendering	066-56	314
Pneumatic tires, appropriate method for determining width of	065-102	147
School buses; loading and unloading children; emergency vehicles required to stop	066-45	298
State road department, vehicles owned by, for use of governor; status	066-89	366
Trailer coaches; annual license tax; period to begin license year	065-141	214
Used cars, incidental sales by business firms; dealer's license not required	066-40	292
MUNICIPAL COURTS		
Bail bond, forfeited; violation of muncipal ordinances; clerk of circuit court, entering of judgment; power	066-106	394
Municipal judge; jurisdiction over juveniles violating laws within corporate limits	065-63	88
MUNICIPALITIES		
Cigarette tax illegally paid to by beverage department; refund required	066-16	245
Homestead exemptions list of applications furnished municipalities; duties of tax assessors	065-42	58
Municipal tax liens and tax sale certificates, enforcement; limitations	065-113	167
Murphy act lands, state-owned, taxed by; prohibited	065-140	212
Nonresident boats, navigating in navigable waters within corporate limits, municipal license tax; authority	065-7	9
Oysters from natural bars, taking within city limits; jurisdiction	065-118	178
Police officers		
Arrest authority without warrant at scene of accident; transfer to appropriate trial court	065-26	37
Compensation allowed when appearing as witnesses before grand jury and prosecuting attorney	066-15	243
Witness fees and mileage; appearance before grand juries and prosecuting attorneys	065-126	190
Population acts, effect of special census	065-2	3
Public buildings; authority of city to require approval of plans by architect as prerequisite to issuance of building permit	066-58	316
School construction, municipal regulations relating to fire prevention; requirement of school officials to meet standards	065-81	113
Stolen property, seized by police officer, not identified as belonging to any person; disposition	065-27	39

	Opinion	Page
MUNICIPALITIES (Cont.)		
Taxes assessed upon county tax roll; increased property valuations; applicability of rollback provisions of §193.03, F.S.	066-71	338
MURPHY ACT LANDS; taxation by certain political subdivisions prohibited	065-140	212
—N—		
NATURAL RESOURCES; salt waters; validity and operation of Ch. 370, F.S., and laws relating to	065-38	51
NEIGHBORHOOD YOUTH CORPS; sponsored by school board; student employees; workmen's compensation, eligibility	065-99	142
NEWSPAPER VENDING MACHINES; occupational licenses; requirements	066-75	345
NEWSPAPERS; newsprint used for printing newspapers; tax situs	065-57	79
NONPROFIT INSTITUTIONS; leasehold interest held and used by for certain period of time; tax situs	065-46	63
NONRESIDENTS; nonresident boats, navigating in navigable waters within corporate limits, municipal license tax; authority	065-7	9
NORTHEAST AREA SPECIAL FIRE CONTROL DISTRICT; post-audit of financial accounts and records by state auditor; without authority	066-91	369
—O—		
OIL AND GAS		
Subsurface rights; tax returns by owners; conveyance of, return by new grantee	065-41	56
Well drilling or producing equipment, tax situs	065-11	15
ORANGE COUNTY; valuation errors resulting in millage errors and reduced tax moneys; publication of notice; cost, payment	065-137	203
ORANGE COUNTY FIRE CONTROL DISTRICT; state and county retirement system, eligibility of officers and employees to participate	066-101	385
OSTEOPATHIC PHYSICIANS; public hospitals; practicing in; no law prohibiting such practice	066-34	281
OUTDOOR BONFIRES; burning of leaves, hedges, paper, etc. in certain containers does not come within definition of	065-82	115
OYSTERS; taking from natural bars within municipalities; jurisdiction	065-118	178

	Opinion	Page
—P—		
P.T.A.; transportation of pupils to schools or school sponsored activities; requirements	066-96	376
PALM BEACH FIRE CONTROL DISTRICT; state and county retirement system, eligibility of officers and employees to participate	066-101	385
PARI-MUTUEL See: RACING		
PARLOR DERBY; horse race film, play money bet by participants; prize awards prohibited by lottery laws	065-25	36
PATROL AGENCIES; personnel of employed by jai alai fronton; occupational license required	065-21	29
PEDDLERS; nonresidents of county; engaged in business; permit requirement; validity of law	065-132	197
PEDICURISTS; limitations of practice as required by Ch. 477, F.S.	065-85	120
PERSONAL PROPERTY; university grounds, abandoned on; disposition	066-97	378
PESTICIDE LAW; omission from chapter re; legal effect	065-103	149
PHARMACISTS		
Barbiturates, possession of in professional capacity but for personal use; exemptions	065-105	154
Retail drug establishments operating without permit; use of word "drugs" by prohibited	065-50	69
PHYSICIANS AND SURGEONS		
Interns or unlicensed physicians; prescribing drugs or writing prescriptions unauthorized	065-71	99
Osteopathic physicians, practicing in public hospitals; no law prohibiting such practice	066-34	281
Physician licensed by another state or county, not licensed in Florida; employment in state institutions; eligibility	065-133	198
PNEUMATIC TIRES; method for determining width of	065-102	147
POLICE OFFICERS See: MUNICIPALITIES		
POPULATION ACTS: special census, effect on	065-2	3
PRENEED FUNERAL SERVICE CONTRACTS; prearrangements for funeral service in advance of need; bank deposit agreement; withdrawal under certain conditions	065-53	74
PREVAILING WAGE LAW; "construction, repair or maintenance of public roads or highways"; construction of phrase as used by law	065-92	130
PRINTING, STATE; class "A" and "B" printing, relating to legislature, defined	065-10	13

	Opinion	Page
PRISONERS: citrus and vegetables, harvesting; use of prison labor; unauthorized activity	065-31	43
PRISONS, STATE; safekeeping defendant; authority of trial court to order nonconvicted defendant to state prison	065-9	12
PRIVATE INVESTIGATIVE AGENCIES; personnel of employed by jai alai fronton; occupational license required	065-21	29
PRIVATE SCHOOLS		
County school board agreements, cooperative educational services; restrictions	065-135	201
State board of education prescribing standards for; without authority	066-12	238
Students, withholding transfer of records; failure to pay for lost, destroyed or damaged textbooks; authorized	066-5	223
Voluntarily seeking accreditation; standards met; state superintendent authorized to accredit	066-43	296
PROBATE LAW		
Attorney fees; probate matters; petition or order of court on fees necessary	065-74	103
Caveats, filing; duty of judge; amount of fee	065-86	121
State agencies, filing of caveats by; fee required	065-86	121
PROBATION OFFICERS; juvenile court; filing of certain reports by officers as part of courts' records; whether considered confidential and privileged	065-51	70
PROCESS; service by corporations; unauthorized	066-66	328
PROSECUTING ATTORNEYS		
Alcoholic beverages; engagement in sale of prohibited	065-73	102
Police officers		
Compensation allowed when appearing as witnesses before grand jury and prosecuting attorney	066-15	243
Witness fees and mileage when appearing before	065-126	190
PUBLIC BUILDINGS; building permit, authority of city to require approval of plans by architect as prerequisite to issuance	066-58	316
PUBLIC DEFENDERS		
Conflict of interest; trial by special assistant prohibited	065-15	23
Insolvent defendant; authority of judge to order representation by	065-29	42
Liens made by; procedure for satisfaction; disposition of funds	065-122	183
Special assistant public defender, authority and legal status	065-15	23
PUBLIC FOOD SERVICE; erection or remodeling; plans and specifications, approval, required	066-51	306

	Opinion	Page
PUBLIC LODGING; erection or remodeling; plans and specifications, approval, required	066-51	306
PUBLIC SERVICE ESTABLISHMENTS; addition of employees; additional license charges	066-42	294
PUBLIC WORKS; public roads, installation of lighting systems; construction of certain phrase as used in the prevailing wage law	065-92	130
PURCHASING COMMISSION, STATE		
Competitive bids		
Prices available to counties and others	066-94	374
Sealed envelopes containing only "no bid"; whether in compliance with laws	066-102	388
Corporations, out-of-state; qualification to do business in state required before being given contracts to supply commodities to state institutions	066-93	373
Purchase order, valid; assignment of funds due under order to third parties; permitted	066-107	396
State agencies' contracts; expenditure of funds involved beyond a legislative biennium; legality	066-90	368
—R—		
RACE TRACK FUNDS; school construction; race track funds and issuance of revenue certificates; authority of board	066-3	219
RACING		
Pari-mutuel ticket, private sale of twin double; constitutes illegal transaction	065-77	109
Private investigative or patrol agencies personnel employed by jai alai fronton; occupational license required	065-21	29
Racing dates; applicability of Ch. 65-435 to previously allocated dates	065-78	109
RACING COMMISSION; witnesses subpoenaed to testify before, fees for certain persons	065-45	62
RADIOACTIVE MATERIALS; junior colleges; use of for instructional purposes; insurance coverage against bodily injury and property damage; premium payments, authorized	066-20	255
RAILROAD ASSESSMENT BOARD; railroad property, assessed valuation by board; county assessors to accept and use for levy of taxes	065-65	91
REAL ESTATE BROKERS AND SALESMEN; salesmen engaged in real estate, occupational license tax; exemption	065-120	182
REAL PROPERTY		
Agreements for sale of, for specified consideration; purchaser under no personal liability to make payments, etc., intangible tax status	066-48	302

	Opinion	Page
REAL PROPERTY (Cont.)		
Federal government, conveyance of real property to; documentary stamp liability	065-69	97
Freehold status of person holding 99-year lease; not eligible to qualify as a freeholder elector	066-38	289
Installment land sales act, classification as to collection of certain service charges	065-52	73
Installment land sales contracts See: INSTALLMENT LAND SALES ACT		
Land producing oil, tax situs	065-11	15
Leasehold interests in real property, procedure for imposition of taxes	065-20	27
School property; purchase for amount in excess of appraised value; school board, authority	065-93	132
RECORDS		
Auditor's work papers, inter-office correspondence on items under examination, etc.; not considered public records	066-88	363
Commercial code, records of certain transactions	066-52	307
Juvenile court; preservation and destruction of certain record forms	065-62	87
Small claims court, docket books, public records; right of public inspection	065-32	44
REFUNDS; sales tax; when payable or allowable	066-55	312
REGISTRY OF COURT; garnishment; attorney's fee deposit; clerk of circuit court, fee	065-95	137
RELIGIOUS INSTITUTIONS OR ORGANIZATIONS		
Leasehold interest held and used by for certain period of time; tax situs	065-46	63
Religious corporations and organizations, domestic or foreign; ad valorem tax, exemption	066-17	247
RESTAURANTS; permit for dancing to music of band, juke box, radio, etc.; license requirements	066-60	319
RETAIL DRUG ESTABLISHMENTS; use of word "drugs" by firms operating without permit prohibited	065-50	69
RETAIL INSTALLMENT SALES CONTRACTS; buyers in, official fees paid by	065-1	1
RETIREMENT SYSTEMS		
Beneficiary, change of; right of retiree	065-107	157
Florida state guard service, creditable as service in organized militia	065-129	192
Judicial retirement		
Combined retirement and social security benefits exceeding retiree's average compensation; computing benefits	066-76	347
Reassumption of office after refund of contribution; procedure for reinstatement	065-54	75
Military leave for service school purposes; eligibility for aggregate creditable service	065-66	94

	Opinion	Page
RETIREMENT SYSTEMS (Cont.)		
State and county officers and employees		
Amelia Island mosquito control district, officers and employees, eligibility	066-101	385
Change of beneficiary, right of retiree	065-107	157
Florida wing of civil air patrol, status of employees within purview of retirement law	065-3	3
Investment of funds in common stock, preferred or other interests in certain firms prohibited; legislative authority	065-16	24
Military leave for service school purposes; eligibility for aggregate creditable service	065-66	94
Orange county fire control district, officers and employees, eligibility	066-101	385
Palm Beach county fire control district, officers and employees, eligibility	066-101	385
School board members		
Expense payments only; eligibility	066-110	399
Retroactive service credit, eligibility requirements	066-110	399
Tampa sports authority, officers and employees, eligibility	066-101	385
RIPARIAN RIGHTS		
Artificial filling by sand material between groins; effect upon riparian ownership of the upland	065-14	21
Coastal construction; privately owned property; conservation board without statutory authority	065-119	180
ROAD AND BRIDGE DISTRICTS, SPECIAL		
County taxes collected within districts; expenditures of funds	065-8	10
Plans and specifications of districts, maintenance and reconstruction; departure from original	065-8	10
ROADS AND BRIDGES; public roads, installation of lighting systems; construction of certain phrase as used in the prevailing wage law	065-92	130
RULES OF CIVIL PROCEDURE; process, service by corporations under Rule 1.34, as amended; unauthorized	066-66	328

—S—

SALES; retail installment sales contracts See: RETAIL INSTALLMENT SALES CONTRACTS		
SALES TAX		
Bathing or swimming caps, used for recreational purposes; subject to wholesale sales tax	066-23	263
Local additional sales tax legislation for school purposes; legality	065-49	69
Refunds of credits, when payable or allowable	066-55	312

	Opinion	Page
SALT WATER FISHERIES		
Oysters; taking from natural bars within city limits, jurisdiction	065-118	178
Validity and operation of Ch. 370, F.S., and laws relating to	065-38	51
SANITARIANS' REGISTRATION BOARD; health officer or state employee serving as member of; eligibility	065-84	117
SCHOLARSHIPS; funds for; use of for student loans; matching federal funds to secure maximum moneys for student loans	066-31	278
SCHOOL BOARDS See: COUNTY BOARDS OF PUBLIC INSTRUCTION		
SCHOOL BUSES See: SCHOOLS		
SCHOOLS		
Buses		
Bus drivers; salary schedule in excess of that recommended by school transportation survey unauthorized	065-93	132
Insurance, liability; school boards; limitation of liability	066-100	384
Loading and unloading children; emergency vehicles required to stop for	066-45	298
Purchase for amount in excess of appraised value unauthorized	065-93	132
Service lease or contracts by unofficial school associations; transport certain pupils; insurance coverage; statutory requirements	066-39	290
Transportation of pupils by unofficial associations to schools or school sponsored activities; requirements	066-96	376
Consolidated high school Franklin county; location	065-136	202
County boards of public instruction See: COUNTY BOARDS OF PUBLIC INSTRUCTION		
Exceptional children, education for; requirements	066-99	383
Eye protective devices, extent as to the use under certain conditions	065-134	200
Instructional personnel, terminal pay by board; authorized	066-54	311
Insurance on school plants and contents; type required	066-65	327
Kindergarten operation, funding from project head-start; subject to inspecting and licensing regulations	065-128	191
Leave of absence; extent of leave	066-54	311
Mentally retarded children, education of; requirement	066-99	383
Military leave, not counted as years of service toward continuing contract or for allocation of minimum foundation funds	065-127	190
Millage		
Elections; use of voting machines; write-in votes; procedure	065-109	160
Method of fixing; problems arising because of §193.03, F.S., as amended	065-90	125
Reduction; school boards; reassessment programs taken prior to certain date; construction of §193.03, F.S., as amended	065-83	115

	Opinion	Page
SCHOOLS (Cont.)		
Millage (Cont.)		
School districts, for; fixed by elections; rollback provisions; affect of §193.03, F.S., as amended	065-112	164
Nonpublic schools; standards met; voluntarily seeking accreditation; state superintendent authorized to accredit	066-43	296
P.T.A.; transportation of pupils to schools or school sponsored activities; requirements	066-96	376
Private schools		
State board of education prescribing standards for; without authority	066-12	238
Voluntarily seeking accreditation; standards met; state superintendent authorized to accredit	066-43	296
Pupils		
Transportation to school or school sponsored activities by unofficial associations, requirements	066-96	376
Withhold transfer of records, refusal for failure to pay for lost books or damaged material; board without authority	066-5	223
Sales tax; local additional tax for school purposes; legality	065-49	69
School boards See: COUNTY BOARDS OF PUBLIC INSTRUCTION		
School construction		
Municipal regulations relating to fire prevention; requirement of school officials to meet standards	065-81	113
Race track funds and issuance of revenue certificates; authority of board	066-3	219
School district millage elections		
Electors, qualifications to participate	065-114	169
Millage established at; applicability of mandatory rollback provisions of §193.03, F.S.	066-70	337
Millage rollback provisions; affect of §193.03, F.S., as amended	065-112	164
Use of voting machines; write-in votes; procedure	065-109	160
School plants and contents, type of insurance required	066-65	327
School trustee elections; electors, qualifications to participate	065-114	169
Teachers		
Classroom teachers' association, professional negotiations agreement with; authority of board	065-138	207
Committees composed of teachers; policies affecting certificated personnel; authority of school board	066-46	300
Contracts		
Employment; Duval county; construction of special act re	066-72	341
Full-time or part-time teachers; requirements	066-53	309
Leave of absence; extent of leave	066-54	311
Personal leave to attend legislative session; granting of; compensation	066-24	265
Salary schedules for instructional personnel; salary differentials based on certain tests; authority of board	066-1	216

	Opinion	Page
SCHOOLS (Cont.)		
Teachers (Cont.)		
Teaching certificates, revocation or suspension; authority of state board of education under certain conditions	065-4	5
Tenure employment; Duval county; precludes issuance of contract for fifth probationary year	066-72	341
Terminal pay by school board; authorized	066-54	311
Voluntary resignation; reappointment under annual contract; eligibility for continuing contract	066-4	220
Textbooks, lost or destroyed by students, withhold transfer student records; board without authority	066-5	223
Unofficial school associations providing bus service for certain pupils; statutory requirements; insurance coverage	066-39	290
Vocational-technical facilities at high schools; funds earmarked for vocational-technical centers not to be used for general purposes	065-94	133
Zoning ordinances, city of Miami; school sites; affect and validity of ordinances	066-10	234
SCIENTIFIC INSTITUTIONS; leasehold interest held and used by for certain period of time; tax situs	065-46	63
SEARCH WARRANT; stolen property, seized by police officer, not identified as belonging to any person; disposition	065-27	39
SECRETARY OF STATE; commercial code; secured transactions effected prior to effective date of code; certificate of renewal or continuance, filing	066-104	390
SHERIFFS		
Budget, jurisdiction of county commissioners upon failure to act prior certain date	066-85	359
Condemnation actions, service of pleadings in; fee	066-19	254
SHOPPING CENTERS; arrest in accident cases occurring on privately owned property of centers outside city limit; authority of department of public safety	066-59	318
SHORE AND BEACH PRESERVATION; setback lines, creation; county commissioners, authority	065-119	180
SIMPSON v. BOHON; educational institutions, rentals derived from; application of rule in case; tax situs	065-22	30
SMALL CLAIMS COURTS		
Docket books; public records, right of public inspection	065-32	44
Judge; proceedings supplementary to execution under §§55.52-55.611, F.S.; powers	066-103	389
SOCIAL SECURITY; judicial retirement benefits See: RETIREMENT SYSTEMS		
SOCIAL WELFARE WORKERS; juvenile courts; filing of certain reports by officers as part of courts' records; whether considered confidential and privileged	065-51	70

	Opinion	Page
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT; real property acquired with certain funds for district; title to lands	065-72	101
SPECIAL ROAD AND BRIDGE DISTRICTS See: ROAD AND BRIDGE DISTRICTS, SPECIAL		
SPENDING PHILOSOPHY LAW		
Consultants, use of welfare funds; budget commission approval	065-117	175
Sanitarians' registration board, state employee or state health officer serving as member of; eligibility	065-84	117
State agency or board, compensation to a corporation where officer, employee or stockholder drawing salary fixed by law; payment authorized	066-92	370
SPY IN THE SKY; highway speed violations; use of patrol plane detection for purpose of clocking the speed of vehicles; legality of arrest by another chase officer on the ground	066-98	378
STAMPS, TRADING See: TRADING STAMPS		
STATE AGENCIES		
Caveats, filing; fee required	065-86	121
Compensation payment		
Corporation where officer, employee, or stockholder drawing salary fixed by law; payment authorized	066-92	370
Person, partnership or firm filling another position and receiving a salary therefrom; legality	066-8	229
Contracts; expenditure of funds involved beyond a legislative beinnium; legality	066-90	368
Investment of certain agencies' funds by state administration board; limitations	065-48	68
STATE BOARD OF ADMINISTRATION See: ADMINISTRATION, STATE BOARD OF		
STATE BOARD OF CONSERVATION See: CONSERVATION, STATE BOARD OF		
STATE BOARD OF EDUCATION See: EDUCATION, STATE BOARD OF		
STATE BOARD OF HEALTH; cosmetology board, rules and regulations adopted by; approval required	065-131	196
STATE BUDGET COMMISSION See: BUDGET COMMISSION, STATE		
STATE FIRE MARSHAL See: FIRE MARSHAL, STATE		
STATE HEALTH OFFICER; sanitarians' registration board, serving as member of; eligibility	065-84	117

	Opinion	Page
STATE INSTITUTIONS		
Foreign corporations; qualification to do business in state required before being given contracts to supply commodities	066-93	373
Physician licensed by another state or country, not licensed in Florida; employment in state institutions; eligibility	065-133	198
STATE OFFICERS AND EMPLOYEES		
Checks, endorsement of, etc., payable to deceased officers; procedure for payment	065-6	8
Compensation, receiving from state agency to person, partnership or firm filling another position and receiving salary therefrom; legality	066-8	229
Health officer, serving as member of sanitarians' registration board; eligibility	065-84	117
Military leave, not counted as years of service toward continuing contract or for allocation of minimum foundation funds	065-127	190
Retirement See: RETIREMENT SYSTEMS		
Salaries, fixing and establishing; legislative act required	065-39	53
Salary of employee, budgeted amount not available; adjustment at later date; legality of payment	065-36	48
State employee, serving as member of sanitarians' registration board; eligibility	065-84	117
STATE PRINTING See: PRINTING, STATE		
STATE PURCHASING COMMISSION See: PURCHASING COMMISSION, STATE		
STATE ROAD DEPARTMENT; Motor vehicles owned by department for use of the governor; status	066-89	366
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; nonpublic schools; standards met; voluntarily seeking accreditation; state superintendent authorized to accredit	066-43	296
STATE TREASURER; checks, endorsement of, etc., payable to deceased officers; procedure for payment	065-6	8
STATE UNIVERSITIES		
Florida state university; student body; bill of rights, adoption of certain proviso; without legal authority	066-30	276
Institute for continuing university studies, limitation and restrictions on total staff	065-24	35
Personal property abandoned on university grounds; disposition	066-97	378
Physician licensed by another state or country, not licensed in Florida; employment in state institutions; eligibility	065-133	198
Traveling show permits; authorized student entertainments; license exemption	066-32	278
STOCK IN TRADE See: TAXATION		

	Opinion	Page
STOCKHOLDERS; shareholder and other accounts, list furnished to taxing officials; requirements	066-78	349
STOLEN PROPERTY; seized by police officer, not identified as belonging to any person; disposition	065-27	39
SUBSURFACE RIGHTS; tax returns by owners; conveyance of, return by new grantee	065-41	56
SUPERINTENDENT OF PUBLIC INSTRUCTION, COUNTY		
Budget, preparation of; employment of expert, etc.; responsibilities and duties re	065-108	159
Junior colleges; food service programs, control and administration	066-77	348
SUWANNEE COUNTY HOSPITAL; indigent hospital program, contribution of certain funds by trustees; legality	065-12	18
SWIMMING CAPS; used for recreational purposes, subject to wholesale sales tax	066-23	263
—T—		
TAMPA SPORTS AUTHORITY; state and county retirement system, eligibility of officers and employees to participate	066-101	385
TAX COLLECTOR See: TAXATION		
TAX EQUALIZATION HEARINGS See: TAXATION		
TAXATION		
Assessment		
Classes of property excluded from millage rollbacks	066-80	352
Oil, mineral and other subsurface rights, return by owner	065-41	56
Subsurface rights; conveyance of title, duty of new grantee	065-41	56
Assessors		
Borrowed funds, placed in special account by county commissioners; handling by; legality	066-9	233
Railroad property, assessed valuation determined by board; assessor to accept and use for levy of taxes	065-65	91
Homestead exemption applications, list furnished to municipalities; duties re	065-42	58
Tax equalization hearings; duties and obligations of assessors	065-68	96
Central and southern Florida flood control district, rollback millage provisions not applicable	066-79	350
Cigarette tax See: CIGARETTE TAX		
Classes of property excluded from millage rollbacks	066-80	352
Collector		
Assessments against tangible personal property, enforcement; responsibilities	065-125	187

	Opinion	Page
TAXATION (Cont.)		
Collector (Cont.)		
Foreclosure suit; enforcement of tax liens; use of common law	066-27	269
Personal property, use of force to seize, pursuant to tax warrant; without authority	066-27	269
Writ of assistance, order similar to; purpose of seizing personal property; without authority	066-27	269
Credit unions, interests and deposits; tax situs	066-82	354
Data processing or similar equipment located within state; used by owners or lessees; subject to tax	065-47	65
Documentary stamp tax		
Commercial code, records of certain transactions	066-52	307
Documents executed and delivered in other states and brought into Florida; status	065-76	105
Federal government, conveyance of real property to; tax situs	065-69	97
Trade acceptances; as known in mercantile field; payments; tax exempt	066-18	251
Educational institutions, rentals derived from; application of rule in Simpson v. Bohon case; tax situs	065-22	30
Equalization board		
Hearings; duties and obligations of assessors	065-68	96
Tax valuations; powers	066-86	361
Exemptions		
Educational institutions, rentals derived from; application of rule in Simpson v. Bohon case	065-22	30
Household goods and personal effects; scope of phrase	065-19	26
Murphy act lands, state-owned; taxation by certain political subdivisions, prohibited	065-140	212
Fee title and leasehold interest held by third party; tax situs	065-46	63
Gasoline and like products; stock in trade; measure of value; tax situs	065-98	139
Homestead exemption		
Applications, list furnished municipalities, duties of tax assessors	065-42	58
House trailers located on property of owner used as permanent homes; tax situs	065-55	76
House trailers		
Towed by motor vehicles over highways from one location to another; ad valorem tax situs	065-89	124
Used primarily for housing purposes; tax situs	065-55	76
Household goods and personal effects; scope of phrase; tax situs	065-19	26
Intangible personal property		
Credit unions, interests and deposits, tax situs	066-82	354
Real property, agreements for sale of for specified consideration; purchaser under no personal liability to make payments, etc.; intangible tax status	066-48	302
Shareholder and other accounts, list furnished to taxing officials; requirements	066-78	349
Tax liens, ownership, release, etc.	065-58	80

	Opinion	Page
TAXATION (Cont.)		
Judicial sales of tangible personal property, affect on certain liens	066-111	401
Land producing oil, tax situs	065-11	15
Leasehold interests		
Held and used by nonprofit institutions for period of time; tax situs	065-46	63
Real property, procedure for imposition of taxes	065-20	27
Licenses and license taxes See: LICENSES AND LICENSE TAXES		
Millage		
Method of fixing; problems arising because of §193.03, F.S., as amended; construed	065-90	125
Reduction; school boards; reassessment programs taken prior to certain date; construction of §193.03, F.S., as amended	065-83	115
Rollback		
Assessed on county tax roll; increased property valuations; applicability of §193.03, F.S.	066-71	338
Building fund millages, application of rollback provisions	066-84	358
Central and southern Florida flood control district; provisions not applicable	066-79	350
Classes of property excluded from	066-80	352
County health unit budget, portions of, application of rollback provisions	066-84	358
School districts; fixed by elections; affect of §193.03, F.S., as amended	065-112	164
School districts, for; fixed by elections; rollback provisions; affect of §193.03, F.S., as amended	065-112	164
Mobile homes or trailers		
Ad valorem or license tax, payment for years 1964-1965; refunds of tax	066-6	224
Tax on; affect of constitutional amendment on §200.45, F.S.	066-7	227
Mortgages, out-of-state; existing notes and obligations; class C intangible tax; documentary stamp tax; tax status	066-25	266
Municipal tax		
Assessed upon county tax roll; increased property valuations; applicability of rollback provisions of §193.03, F.S.	066-71	338
Liens and tax sale certificates, enforcement; limitations	065-113	167
Murphy act lands, state-owned; taxation by certain political subdivisions, prohibited	065-140	212
Newsprint used for printing newspapers; tax situs	065-57	79
Oil drilling equipment upon given parcel of land; tax situs	065-11	15
Railroad property, assessed valuation determined by board; assessor to accept and use for levy of taxes	065-65	91
Real property		
Agreements for sale of for specified consideration; purchaser under no personal liability to make payments, etc.; intangible tax status	066-48	302

	Opinion	Page
TAXATION (Cont.)		
Real Property (Cont.)		
Valuation errors resulting in millage errors and reduced tax moneys; publication of notice; cost, payment	065-137	203
Religious corporations and organizations, domestic or foreign; ad valorem tax, exemption	066-17	247
Rollback millage See: Millage, this head		
Sales tax See: SALES TAX		
School districts, millage established at millage election; applicability of mandatory rollback provisions of §193.03, F.S.	066-70	337
Shareholder and other accounts, list furnished to taxing officials; requirements	066-78	349
Stock in trade; gasoline and like products; measure of value; tax situs	065-98	139
Subsurface rights; tax returns by owners; conveyance of, return by new grantee	065-41	56
Tangible personal property		
Assessments against and enforcement; tax collector, responsibilities	065-125	187
Delinquent tax, collection; tax collector, authority	066-27	269
Liens for taxes; tax collector obligations	065-125	187
Newsprint used for printing newspapers; tax situs	065-57	79
Oil drilling equipment upon given parcel of land; tax situs	065-11	15
Sale under tax warrant		
Chattel mortgage, affect of lien on	066-111	401
Tax collector's lien takes precedence over landlord's lien	066-111	401
Tax warrant takes precedence over landlord's lien	066-111	401
Tax liens of municipalities, enforcement; period of limitation	065-113	167
Valuation errors resulting in millage errors and reduced tax moneys; publication of notice; cost, payment	065-137	203
TEACHERS See: SCHOOLS		
TELEVISION COMMISSION See: EDUCATIONAL TELEVISION COMMISSION		
TIRES; pneumatic tires, appropriate method for determining width of	065-102	147
TRADING STAMPS		
Redemption of trading stamps obtained through stamp exchanges or from others	066-61	320
	066-68	331
Stamp exchanges; authority of company to refuse to redeem exchanged stamps	066-61	320
	066-67	329
TRAFFIC; speed violations; use of patrol plane detection for purpose of clocking the speeds of vehicles; legality of arrest by another chase officer on ground	066-98	378

	Opinion	Page
TRAFFIC ACCIDENT; police officers, arrest authority without warrant at scene of accident; transfer to appropriate trial court	065-26	37
TRAFFIC COURTS; traffic offenses, court having jurisdiction over; suspension of driver's license, authority of court	065-79	110
TRAILER COACHES OR HOUSES		
Annual license tax; period to begin license year	065-141	214
Located on property of owner used as permanent home; tax situs	065-55	76
Moving over highways to escape rising waters; permit required	065-34	47
Permanently affixed to land and taxable as real property; certificate of title, surrendering for cancellation	066-56	314
Taxes, ad valorem or license; payment for years 1964-1965; refunds of taxes	066-6	224
TRAVEL EXPENSES		
Advance payment to certain district officers and employees, prohibited	066-105	392
County boards of public instruction, members; payment	065-13	20
County commissioners, official business; limitations	066-83	355
TRAVELERS CHECKS; sale of; construction of section re minimum requirements	065-80	112
TRAVELING SHOWS; state universities; authorized student entertainments; license permit not required	066-32	278
TRUSTEES, INTERNAL IMPROVEMENT FUND; Florida inland navigation district, conveyance of certain lands in spite of existing option and restrictions; validity of Ch. 65-900, Laws of Florida	066-22	259
TURNPIKE AUTHORITY, FLORIDA STATE; engineering fees, settlement of claims for	065-75	104
—U—		
UNIFORM COMMERCIAL CODE See: COMMERCIAL CODE		
UNIFORMS; public employees engaged in the eradication of mosquitoes; furnishing protective uniforms; authority of county commissioners	065-101	146
UNITED STATES; federal government, conveyance of real property to; documentary stamp liability	065-69	97
—V—		
VENDING MACHINES; newspapers; occupational licenses, requirement	066-75	345

	Opinion	Page
VOCATIONAL-TECHNICAL CENTERS; fund earmarked; establishment of priorities; state board of education, powers	065-94	133

—W—

WAGES; public roads, installation of lighting systems; construction of certain phrase as used in the prevailing wage law	065-92	130
WATER OR SEWER SYSTEMS; county-wide plan for construction; federal aid, acceptance by county; authorized	066-26	268
WEIGHT REVIEW BOARD; motor vehicles, unlawful axle weight; maximum fine on first one thousand pounds	065-59	82
WELFARE; department of welfare, day care and other workshops; consultants; use of welfare funds; budget commission approval	065-117	175
WITNESSES		
County-owned motor vehicles involved in accidents; authority of county employee to disclose details	065-23	34
Police officers		
Compensation allowed when appearing as witnesses before grand jury and prosecuting attorney	066-15	243
Fees and mileage when appearing before grand juries and prosecuting attorneys	065-126	190
Racing commission, certain persons subpoenaed to testify before; payment of fees	065-45	62
WORKMEN'S COMPENSATION LAW; neighborhood youth corps; economic opportunity act; student employees, benefits; eligibility	065-99	142
WORTHLESS CHECKS		
Cases involving certain amount; prepayment of costs	065-87	123
Dismissed cases, etc.; payment of judge's fees; other misdemeanor cases	065-116	174
WRITS OF EXECUTIONS; constables, power to levy	065-44	60

—Y—

YACHT AND SHIP BROKERS' ACT; broker defined; initial licensing year	065-91	129

—Z—

ZONING; county zoning; effect of regulations on businesses holding liquor licenses within area	065-56	78

CITATOR

CITATOR TO FLORIDA STATUTES, LAWS OF FLORIDA AND STATE CONSTITUTION, CONSTRUED AND CITED IN OPINIONS RENDERED BETWEEN JANUARY 1, 1965, THROUGH DECEMBER 31, 1966.

FLORIDA STATUTES

Section	Opinion	Page
1.01(8)	065-73	102
2.01	065-38	51
11.031(2)	065-2	3
11.13(1)	066-8	229
14.02-14.022	066-37	286
21.111	066-83	355
21.121	066-88	363
27.04	066-15	243
27.51(1)	065-29	42
27.52(1)	065-29	42
27.53(2)	065-15	23
27.54	065-122	183
27.56	065-122	183
28.22	065-52	307
28.221	066-52	307
28.24	065-95	137
29.02	066-67	329
30.15	065-44	60
30.17	065-44	60
30.23	066-19	254
30.231(1)	066-19	254
30.49(3)	066-85	359
32.20	066-15	243
34.12	065-73	102
34.20	066-108	396
34.21	066-108	396
36.17(1)	065-86	121
36.19-36.21	065-70	99
36.20(2)	065-116	174
37.15	065-32	44
	065-44	60
37.16	065-44	60
37.18	065-44	60
39.01	065-63	88
39.01(6)	065-33	46
	065-63	88
39.01(12)	065-63	88
	065-115	172
39.02(1)	065-51	70
39.02(1)(a)	065-63	88
39.02(6)	065-43	59
	065-115	172
39.03	066-2	217
	066-44	296
39.03(6)	065-33	46
	066-2	217
	066-44	296
39.05	066-2	217
39.08	065-43	59
39.10	065-115	172
39.10(3)	065-43	59
39.11	065-115	172
39.12(2)	065-62	87
39.12(4), (6)	065-51	70
39.20	065-51	70
	066-44	296
42.08	065-32	44
44.05(2)	065-86	121
47.12	065-44	60
55.52-55.611	066-103	389
62.36	066-27	269
62.37	066-27	269
74.03	066-57	315
74.031	066-19	254
	066-57	315
74.05	066-57	315
74.051	066-57	315
74.121	066-57	315
77.28	065-95	137
78.10	066-27	269
83.08	066-111	401
90.14	065-45	62
	065-126	190
	066-15	243
90.141	065-45	62
	065-126	190
	066-15	243
90.15	065-45	62
92.35	066-52	307
95.021	065-113	167
97.021(7)	066-38	289
97.021(9)	065-109	160
97.041	065-114	169
97.071	065-104	152
97.081	065-100	144
98.051(2)	065-100	144
98.161(5)	065-104	152
99.021(1)(i)	066-64	325
99.172	066-35	283

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page
100.112	066-62	322
100.231	065-100	144
100.241(1)(a)	066-38	289
104.061	066-35	283
112.02	065-133	198
112.061	065-13	20
	065-40	55
	065-45	62
	065-126	190
	066-11	234
	066-83	355
	066-105	392
112.061(1)(b)	066-83	355
112.061(2)(a)-(d)	066-105	392
112.061(2)(k)-(m)	065-13	20
112.061(4)	065-13	20
112.061(5)	066-105	392
112.061(6)	066-11	234
	066-105	392
112.061(7)(d)	065-13	20
	066-63	324
112.061(7)(e)	066-63	324
112.061(8)	065-13	20
	066-63	324
112.061(10)(a), (b)	065-13	20
112.12	066-28	272
115.01-115.06	065-66	94
115.07	065-66	94
	065-127	190
115.08-115.15	065-66	94
116.34	065-5	7
	065-104	152
116.34(3)	065-104	152
116.34(3)(a)-(c)	065-5	7
119.01	065-23	34
	065-32	44
	066-88	363
119.02	065-23	34
119.03	065-23	34
119.04	065-23	34
	065-62	87
121.02	065-66	94
121.02(1)	066-110	399
121.10	065-107	157
122.02(1)	066-101	385
	066-110	399
122.02(3)	065-84	117
122.02(4)(a)	065-66	94
122.03	066-110	399
122.08	065-16	24
	065-107	157
122.12	065-107	157
122.14	065-16	24
122.17	065-16	24
122.28	066-76	347
123.05	065-54	75
123.10	065-54	75
123.29	066-76	347
125.01	066-83	355
125.01(4)	066-37	286
125.03	065-73	102
125.08	066-9	233
129.03	065-137	203
129.05	065-137	203
129.06	066-105	392
134.02(1)	066-110	399
134.10	065-107	157
135.01	066-84	358
135.02	066-84	358
136.06	066-9	233
140.18	065-8	10
145.041	065-13	20
145.061	066-108	396
153.03(4)	066-26	268
153.04	066-26	268
154.01	065-128	191
	066-84	358
154.02	066-84	358
154.04	065-128	191
154.05	065-128	191
155.18	066-34	281
161.041	065-119	180
161.061	065-119	180
161.25-161.41	065-119	180
165.09	065-118	178
167.61	066-91	369
167.72	065-42	58
176.02	066-10	234
186.04	066-59	318
192.01	065-11	15
	066-80	352
192.04	066-42	294
192.05	065-98	139
	065-137	203
192.051	065-22	30
192.06	065-22	30
	065-46	63
	065-140	212
	066-17	247
192.06(3)	065-22	30
	065-46	63
	066-13	238
192.06(4)	066-17	247
192.07	065-46	63
192.08	065-140	212
192.09	065-46	63

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page
192.201	065-19	26
	065-114	169
192.21	065-58	80
	065-113	167
	065-125	187
	065-137	203
	066-27	269
	066-111	401
192.28	066-111	401
192.31	065-58	80
	066-86	361
192.38	065-140	212
192.62	065-20	27
	065-46	63
	065-47	65
193.021	065-11	15
	065-112	164
	066-9	233
193.03	065-83	115
	065-90	125
	065-112	164
	065-130	194
	066-70	337
	066-71	338
	066-79	350
	066-80	352
	066-84	358
193.03(1)	065-90	125
	066-71	338
193.03(5)	066-71	338
193.03(6)	065-90	125
	066-80	352
193.031	065-130	194
193.032	065-130	194
	066-70	337
193.11	066-42	294
193.111	066-9	233
193.112	066-9	233
193.12	065-41	56
193.21	065-41	56
193.221	065-11	15
	065-41	56
193.25	065-68	96
	066-86	361
193.27	065-68	96
	066-86	361
193.40	066-6	224
193.41	065-90	125
193.46-193.49	065-125	187
194.58	065-113	167
194.59	065-113	167
195.01	065-65	91
195.05	065-137	203
196.08	066-27	269
196.12	065-113	167
199.01	066-48	302
199.011	066-48	302
199.02(3),(4)	066-25	266
199.022	066-25	266
199.022(1)	066-82	354
199.022(1)(b)	066-78	349
199.022(3)	066-25	266
199.04	065-58	80
199.05	066-48	302
199.051	066-78	349
	066-82	354
199.061(3)	066-78	349
199.07	065-41	56
199.071	066-78	349
199.081	066-48	302
199.11	066-25	266
199.14	065-58	80
199.141	066-25	266
199.15	065-58	80
199.16	065-90	125
199.17	065-58	80
199.18	065-58	80
199.20-199.23	065-58	80
199.26	065-58	80
199.31	065-58	80
199.331(3)	065-137	203
200.01	065-47	65
	065-57	79
	065-98	139
200.02	065-125	187
	065-141	214
	066-27	269
	066-111	401
200.08	065-41	56
	065-47	65
200.10	066-86	361
200.16	065-125	187
200.25	065-55	76
200.26	065-90	125
200.27	065-125	187
	066-27	269
	066-111	401
200.27-200.33	065-125	187
200.30	065-55	76
	065-125	187
200.45	065-55	76
	066-6	224
	066-7	227
201.01	065-69	97
	065-76	105
201.02	065-69	97

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page
201.08	065-76	105
	066-18	251
201.22	066-52	307
204.01(5)	065-25	36
205.01	066-36	285
	066-42	294
205.03	066-42	294
205.10	066-7	227
205.16	065-21	29
205.29	066-60	319
205.322	066-32	278
205.37	065-21	29
	066-60	319
205.432	066-13	238
205.52	065-120	182
205.53	066-42	294
205.59	065-132	197
205.63	066-75	345
208.04	065-98	139
208.45	065-98	139
210.02	066-16	245
210.03	066-16	245
211.02	065-11	15
211.13	065-11	15
212.02	066-55	312
212.05	066-55	312
212.06(1)	066-55	312
212.17(1)	066-55	312
212.50-212.58	066-23	263
215.19	065-92	130
215.22	065-52	73
215.26	065-76	105
	066-6	224
	066-55	312
215.32	065-117	175
215.37	065-52	73
215.44-215.54	065-48	68
216.17	066-28	272
219.04	065-44	60
228.041	065-127	190
228.041(11)	066-54	311
228.041(19)	065-112	164
	066-53	309
228.041(24)	065-127	190
	066-53	309
228.14	066-77	348
229.051(1),(2)	066-5	223
229.061(19)	066-43	296
229.521(20)	066-43	296
230.15	066-29	275
230.201	065-13	20
230.22	065-138	207
	066-46	300
230.23	065-138	207
	066-20	255
230.23(4)(k)	065-135	201
230.23(5)(a)	066-33	279
230.23(5)(b)	065-108	159
	066-33	279
230.23(5)(d)	066-33	279
230.23(5)(h)	066-4	220
230.23(6)(e)	066-99	383
230.23(9)	066-20	255
230.23(9)(d)	066-20	255
	066-65	327
230.23(10)(i)	066-63	324
230.23(11)(b)	065-106	156
230.23(18)	065-106	156
230.33(7)(a)	066-33	279
230.33(7)(h)	066-4	220
230.33(7)(i)	066-33	279
230.38	065-106	156
230.39	065-106	156
230.63(2)	065-94	133
230.631	065-94	133
230.0101	066-77	348
231.16(2)	065-4	5
	066-4	220
231.28	065-4	5
231.351	066-4	220
	066-72	341
231.36	065-4	5
	066-4	220
231.39(2)	065-127	190
231.40	066-54	311
231.42	066-24	265
231.43	066-24	265
231.54-231.59	065-138	207
	066-46	300
232.23	066-5	223
232.45	065-134	200
233.47	066-5	223
234.01	066-39	290
234.03	066-39	290
	066-96	376
234.03(1)	066-39	290
	066-100	384
234.03(5)	066-96	376
234.04	066-45	298
234.06	066-39	290
234.07	066-96	376
234.08	066-45	298
	066-96	376
235.07	066-65	327
235.26	065-81	113

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page
235.32	065-110	162
236.02(3)	066-53	309
236.02(6)	066-1	216
236.04(4)	066-99	383
236.07(3)(c)	066-1	216
	066-53	309
236.32	065-130	194
236.32(1),(3)	065-109	160
236.32(4)	065-114	169
236.32(6)	065-130	194
236.33	065-112	164
	066-70	337
236.37	066-3	219
236.39	066-3	219
236.41	066-3	219
237.01-237.24	065-93	132
237.02(1)	066-33	279
237.05-237.22	065-112	164
237.05-237.24	065-137	203
237.09	065-108	159
	066-33	279
237.18	065-137	203
237.19	065-137	203
237.20	066-105	392
237.23	066-33	279
237.23(1),(2)	065-93	132
237.31(2)	066-29	275
237.31(3)	066-33	279
237.32(3)	066-29	275
238.01(4)	066-1	216
239.54-239.58	066-30	276
239.65	066-73	342
239.0105	065-24	35
239.0107(1)-(3)	065-24	35
240.001	066-30	276
240.042	066-30	276
246.09-246.11	066-21	256
246.14	066-21	256
250.02	065-129	192
250.04	065-129	192
250.22	065-129	192
250.48	065-66	94
	065-127	190
250.49	065-66	94
251.01	065-129	192
252.02	066-37	286
252.071	066-37	286
253.01-253.03	065-140	212
253.12	065-140	212
282.01	065-72	101
	065-84	117
	065-117	175
	065-122	183
	066-8	229
282.011(10)	066-11	234
282.011(16)	065-3	3
282.013	065-94	133
282.021(5)	066-28	272
282.021(14)	065-84	117
282.021(18)	065-117	175
	066-8	229
282.021(19),(20)	065-117	175
282.051	065-84	117
	065-117	175
282.051(3)	066-92	370
282.051(3)(e)	065-84	117
	065-117	175
	066-8	229
	066-92	370
282.051(3)(f)	066-28	272
282.051(6)	065-84	117
	065-117	175
	066-8	229
	066-92	370
282.081	066-90	368
282.091	066-90	368
283.04-283.06	065-10	13
283.10	065-10	13
283.17	065-10	13
283.19	065-10	13
287.011(2)	065-10	13
287.051	066-94	374
288.153	065-48	68
317.011(1)	066-45	298
317.011(33)	065-26	37
317.011(62)	065-102	147
317.012	066-59	318
317.041	066-59	318
317.041(1)	065-26	37
	066-69	331
317.041(5)(b), (c)	066-45	298
317.043	066-59	318
317.071-317.211	065-26	37
	066-59	318
	066-69	331
317.121-317.191	065-23	34
317.20	066-69	331
317.201	066-69	331
317.221	066-98	378
317.233	065-26	37
317.234	066-98	378
317.701	066-98	378
317.801(3)(b)	065-59	82
317.903	066-45	298
317.961	065-102	147
318.03	065-64	90
318.031(2)	066-56	314

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page
319.01-319.20	066-56	314
320.01	066-6	224
320.01(1)	065-34	47
320.06	065-64	90
320.07	065-141	214
320.08	065-34	47
	065-89	124
	065-141	214
320.081	065-55	76
	065-141	214
	066-6	224
	066-7	227
	066-56	314
320.15	066-6	224
320.19	066-7	227
320.20	066-6	224
320.24	065-7	9
320.27	066-40	292
321.04(1)	066-89	366
321.05	066-98	378
322.01(11)	065-79	110
322.25	065-79	110
322.26	065-79	110
	066-59	318
322.27	065-79	110
	066-59	318
323.29(1)	066-96	376
324.051	065-23	34
	066-59	318
334.03(13)	065-92	130
334.09(1)	066-8	229
335.05(1)	065-26	37
	066-69	331
336.02	066-83	355
336.57	065-8	10
370.01	065-14	21
370.02	065-14	21
370.03(1),(2)	065-118	178
370.10	065-38	51
370.10(1)	065-118	178
371.02-371.31	065-38	51
371.0100-371.0108	065-7	9
378.07	065-72	101
378.20	065-140	212
378.28	066-105	392
378.30	065-140	212
378.46	065-72	101
381.031(1)	065-131	196
388.161	065-101	146
394.03	065-133	198
394.031	065-133	198
394.57	065-43	59
398.08(1)	065-71	99
401.08(2)	065-12	18
401.11	065-12	18
404.01	066-69	331
404.01(3)	065-105	154
404.02(1),(4)	065-105	154
404.04	065-105	154
440.02	065-99	142
440.56(1)	065-101	146
447.03	066-46	300
455.06	066-65	327
	066-100	384
455.06(1)	065-97	139
458.13	065-71	99
	065-85	120
	065-133	198
458.13(1)	065-71	99
	065-85	120
458.13(2)	065-71	99
	065-133	198
458.13(2)(j)	065-71	99
	065-133	198
458.13(3)	065-71	99
458.15	065-71	99
	065-85	120
	065-133	198
459.13	066-34	281
460.07(1)(g)	065-67	95
460.11(2)(c)	066-74	343
460.13(3)(d)	066-74	343
460.13(3)(g)1.,2.	066-74	343
461.01	065-85	120
461.12	065-85	120
465.031(1)(b)	065-50	69
465.031(2)	065-71	99
465.18(1),(5)	065-50	69
465.21	065-50	69
467.09(1)	066-51	306
	066-58	316
467.09(3)	066-58	316
470.01(6)(b)	066-109	398
470.10(8)	066-109	398
475.01	065-120	182
476.11	065-17	25
477.03(1)(f),(g)	065-85	120
477.08(1)(c)	065-85	120
477.08(3),(7)	065-60	83
477.23(1)-(10)	065-131	196
477.29	065-60	83
478.021(2)	066-49	303

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page
478.121	065-52	73
	066-49	303
478.131	065-52	73
487.01-487.12	065-103	149
491.03(2)	065-84	117
491.03(4)	065-84	117
	066-8	229
493.03	065-21	29
493.06	065-21	29
493.08	065-21	29
493.14	065-21	29
509.211(4)	066-51	306
520.34	065-1	1
537.01-537.12	065-91	129
550.02(4)	065-45	62
550.08	066-31	278
550.10	065-21	29
550.16(7)	065-77	109
550.291	065-78	109
551.07	065-21	29
554.02(1),(2)	065-40	55
554.07	065-40	55
554.071	065-40	55
559.01-559.06	066-61	320
560.04(1)	065-80	112
560.08(1),(3)	065-80	112
560.13	065-80	112
561.25	065-73	102
561.34(1)(c),(d)	065-56	78
561.44	065-56	78
601.05	066-28	272
601.10-601.12	066-28	272
601.28	066-28	272
601.30	066-28	272
608.0100(2)	066-92	370
613.01	066-93	373
616.09	065-139	208
616.091	065-139	208
624.0307	066-13	238
624.0308	066-13	238
624.0312	066-13	238
625.0123	065-16	24
639.09	065-53	74
659.20	065-123	184
659.271	065-124	186
676.01	066-18	251
676.48	066-18	251
679.9-104	066-50	305
679.9-303	066-52	307
679.9-401	066-52	307
679.9-4011	066-52	307
679.9-402	066-52	307
679.9-405(2)	066-52	307
680.10-101(2)	066-104	390
680.10-102	066-104	390
680.10-102(2)	066-52	307
680.10-103	066-52	307
680.10-104	066-52	307
683.01	065-124	186
683.02	065-124	186
687.03	065-1	1
689.01	066-38	289
701.04	065-122	183
705.01	066-97	378
732.29	065-86	121
734.01(1),(2)	065-74	103
741.21	066-81	353
823.02	065-82	115
832.05	065-87	123
832.05(7)	065-87	123
	065-116	174
839.221	066-46	300
849.01	065-139	208
	066-14	241
849.09	065-26	37
849.092	065-25	36
849.11	066-14	241
849.14	065-139	208
	066-14	241
	066-41	292
859.05	065-71	99
860.01	066-69	331
876.05	066-64	325
901.01	065-96	137
901.15	065-26	37
901.15(1)	066-98	378
902.19(4)	065-126	190
	066-15	243
903.16	066-106	394
903.26	065-111	163
	066-106	394
903.27	066-106	394
917.01	065-43	59
932.05	065-115	172
933.14	065-27	39
936.01	065-44	60
939.06	066-67	329
939.14	065-116	174
939.16	065-87	123
	065-116	174
944.02(5),(6)	065-9	12
944.03(3)	065-9	12
945.07	065-31	43
945.11	065-31	43
950.02(3)	065-9	12
951.10	065-31	43

CITATOR TO CHAPTERS, FLORIDA STATUTES

Chapter	Opinion	Page
21	066-83	355
	066-91	369
29	066-67	329
39	065-33	46
	065-43	59
	065-51	70
	065-63	88
	065-115	172
	066-2	217
	066-44	296
42	066-103	389
47	066-66	328
73	066-19	254
	066-57	315
74	066-19	254
	066-57	315
95	065-113	167
119	065-23	34
	066-88	363
121	065-16	24
	065-66	94
	065-107	157
	066-110	399
122	065-3	3
	065-16	24
	065-66	94
	065-107	157
	066-101	385
	066-110	399
123	065-54	75
129	065-137	203
134	065-16	24
	065-66	94
	065-107	157
	066-110	399
139-141	065-8	10
153	066-26	268
155	065-12	18
	066-34	281
161	065-119	180
176	065-119	180
	066-10	234
193	065-83	115
199	065-47	65
	065-57	79
	066-25	266
	066-48	302
	066-78	349
	066-82	354
200	065-11	15
	065-20	27
	065-47	65
	065-57	79
	065-98	139
200 (cont.)	065-125	187
	066-7	227
201	065-69	97
	065-76	105
	066-25	266
	066-52	307
204	065-25	36
205	066-36	285
	066-42	294
208	065-25	36
	065-49	69
210	066-16	245
211	065-11	15
212	065-49	69
	066-55	312
219	065-44	60
228	066-12	238
229	066-12	238
230	065-106	156
	066-12	238
	066-72	341
231	066-4	220
	066-12	238
232	066-12	238
233	066-12	238
234	066-12	238
	066-39	290
	066-96	376
235	065-81	113
	066-12	238
236	065-106	156
	066-3	219
	066-12	238
237	065-83	115
	065-106	156
	066-12	238
238	066-12	238
239	065-24	35
246	066-21	256
247	066-5	223
	066-12	238
250	065-129	192
251	065-129	192
252	066-37	286
282	065-122	183
	066-8	229
	066-90	368
287	065-10	13
317	065-26	37
	066-59	318
319	065-5	7
	066-56	314

CITATOR TO CHAPTERS, FLORIDA STATUTES

Chapter	Opinion	Page	Chapter	Opinion	Page
320	065-7	9	460	066-74	343
	065-34	47	465	065-50	69
	065-89	124	467	066-58	316
322	065-79	110	475	065-120	182
323	066-96	376	477	065-60	83
324	065-23	34		065-85	120
334-339	065-8	10	478	065-52	73
341	065-8	10		066-49	303
343	065-8	10	487	065-103	149
348	065-8	10	491	065-84	117
370	065-38	51	493	065-21	29
373	065-38	51	520	065-1	1
	065-72	101	524	066-104	390
374	065-38	51	537	065-91	129
375	065-38	51	550	065-78	109
377	065-11	15		066-3	219
378	065-72	101	560	065-80	112
	066-105	392	561	065-56	78
381	066-26	268	601	066-28	272
388	065-101	146	616	066-32	278
	066-101	385	617	065-22	30
389	066-101	385	633	065-82	115
390	066-101	385	639	065-53	74
398	065-71	99	657	066-82	354
401	065-12	18	673	066-104	390
440	065-99	142	679	066-50	305
	065-101	146		066-52	307
450	066-44	296	903	066-106	394
458	065-71	99	917	065-43	59
	065-133	198	944	065-9	12

CITATOR TO STATE CONSTITUTION

Article	Opinion	Page	Article	Opinion	Page
DR., §1	065-98	139	III, §27	065-39	53
	066-79	350		066-11	234
DR., §12	066-22	259		066-101	385
	066-46	300	III, §30	065-39	53
II	066-37	286	IV, §1	066-37	286
III, §1	066-37	286	IV, §3, 1869	065-39	53
III, §2	065-61	84	IV, §3	065-39	53
III, §3	065-61	84	IV, §4	066-37	286
III, §4	066-8	229	IV, §5	066-37	286
III, §11	065-61	84	IV, §6	066-37	286
III, §12	065-10	13	IV, §8	065-61	84
III, §16	065-39	53	IV, §10, 1865	065-10	13
	065-55	76	IV, §11, 1838		
	065-103	149	and 1861	065-10	13
	065-139	208	IV, §16	065-39	53
	066-28	272	IV, §17	065-133	198
III, §20	065-67	95	IV, §20	065-6	8
III, §21	065-61	84	IV, §24	065-6	8

CITATOR TO STATE CONSTITUTION

Article	Opinion	Page
IV, §29	065-39	53
	066-8	229
V	065-96	137
V, §1	065-45	62
	065-96	137
	066-37	286
V, §4(4)	065-39	53
V, §5(4)	065-39	53
V, §6	066-83	355
	066-103	389
V, §7	065-39	53
V, §8, 1868	065-61	84
V, §8	065-73	102
V, §9	065-37	48
	065-39	53
V, §9(1)	065-37	48
V, §9(5)	065-73	102
V, §11(3)	065-44	60
V, §12	065-37	48
	065-63	88
V, §19	065-39	53
V, §25	065-96	137
VI, §1	065-114	169
VII, §5	065-2	3
	065-28	40
VIII, §6	065-37	48
	065-39	53
	065-65	91
	066-86	361
VIII, §11	065-37	48
	065-96	137
	066-71	338
VIII, §11(1)(f)	065-37	48
VIII, §11(9)	065-37	48
VIII, §§12-22	066-71	338
IX, §1	065-11	15
	065-22	30
	065-46	63
	065-47	65
	065-57	79
	065-58	80
	065-98	139
	065-112	164
	066-9	233
	066-13	238
	066-17	247
	066-25	266
	066-36	285
	066-79	350
IX, §2	065-58	80
IX, §4	065-39	53
	065-117	175
	066-6	224
IX, §5	065-7	9
IX, §5 (cont.)	065-42	58
	065-58	80
IX, §6	066-84	358
IX, §9	065-46	63
	066-17	247
IX, §10	065-16	24
	066-105	392
IX, §11	065-19	26
	065-114	169
IX, §13	065-7	9
	065-55	76
	065-89	124
	065-141	214
	066-6	224
	066-7	227
	066-17	247
	066-56	314
X, §1	065-55	76
X, §7	065-55	76
	065-112	164
	066-7	227
	066-17	247
	066-38	289
	066-79	350
	066-80	352
	066-86	361
XII	065-130	194
XII, §3	066-30	276
XII, §7, 1868	065-16	24
XII, §8	065-106	156
	065-130	194
XII, §10	065-83	115
	065-106	156
	065-112	164
	065-114	169
	065-130	194
	066-70	337
XII, §13	065-135	201
XII, §19	065-94	133
XIII, §3	066-37	286
XIV, §2	065-129	192
XV, §3	065-128	191
XVI, §6	065-10	13
XVI, §7	066-95	375
XVI, §9	066-67	329
XVI, §11	065-16	24
	065-36	48
XVI, §16	065-11	15
	065-22	30
	065-46	63
	065-47	65
	065-57	79
	066-17	247
	066-36	285

CITATOR TO SESSION LAWS

Chapter, Year	Opinion	Page
1121, Acts 1861	065-38	51
3292, Acts 1881	065-38	51
3293, Acts 1881	065-38	51
3578, Acts 1885	065-133	198
3871, Acts 1889	065-38	51
4322, Acts 1895	066-86	361
4558, Acts 1897	065-38	51
4563, Acts 1897	065-38	51
5202, Acts 1903	065-129	192
5435, Acts 1905	065-38	51
5472, Acts 1905	066-89	366
5596, Acts 1907	065-41	56
5604, Acts 1907	066-89	366
5882, Acts 1909	066-89	366
6208, Acts 1911	065-8	10
6212, Acts 1911	066-56	314
6421, Acts 1913	066-75	345
6532, Acts 1913	065-38	51
6535, Acts 1913	065-38	51
6877, Acts 1915	065-38	51
6881, Acts 1915	066-56	314
6969, Acts 1915	065-38	51
7275, Acts 1917	065-34	47
	066-56	314
7389, Acts 1917	065-38	51
7737, Acts 1918	066-56	314
7842, Acts 1919	066-103	389
8374, Acts 1919	065-113	167
8410, Acts 1921	065-34	47
8502, Acts 1921	065-129	192
9157, Acts 1923	065-34	47
	066-56	314
10040, Acts 1925	065-113	167
	065-137	203
10182, Acts 1925	065-34	47
11838, Acts 1927	065-38	51
12197, Acts 1927	065-103	149
13644, Acts 1929	065-38	51
14491, Acts 1929	066-60	319
	066-75	345
14572, Acts 1929	065-113	167
	065-137	203
14723, Acts 1931	066-22	259
15659, Acts 1931	065-49	69
16178, Acts 1933	065-38	51
17016, Acts 1935	065-38	51
17178, Acts 1935	065-55	76
17442, Acts 1935	065-113	167
17457, Acts 1935	065-137	203
18011, Acts 1937	066-42	294
	066-60	319
	066-75	345
18134, Acts 1937	065-112	164
18296, Acts 1937	065-140	212
19274, Acts 1939	065-38	51
19355, Acts 1939	065-112	164
	065-130	194
19515, Acts 1939	065-113	167
19766, Acts 1939	066-110	399
20214, Acts 1941	065-129	192
20226, Acts 1941	066-56	314
20578, Acts 1941	066-69	331
20718, Acts 1941	065-66	94
20722, Acts 1941	065-113	167
	065-137	203
	066-71	338
	066-79	350
20917, Acts 1941	066-56	314
20956, Acts 1941	066-42	294
	066-75	345
21197, Acts 1941	066-72	341
21783, Acts 1943	065-129	192
21945, Acts 1943	065-38	51
22008, Acts 1943	065-76	105
22031, Acts 1943	066-97	378
22079, Acts 1943	065-113	167
	066-71	338
22819, Acts 1945	065-38	51
22823, Acts 1945	065-38	51
22833, Acts 1945	065-117	175
22938, Acts 1945	066-110	399
23547, Acts 1945	065-12	18
23675, Acts 1947	065-133	198
23828, Acts 1947	065-113	167
23959, Acts 1947	066-110	399
23969, Acts 1947	066-6	224
	066-7	227
24113, Acts 1947	066-7	227
25112, Acts 1949	065-129	192
25209, Acts 1949	065-38	51
	066-79	350
	066-105	392
25214, Acts 1949	065-72	101
	066-79	350
	066-105	392
25270, Acts 1949	065-72	101
	066-79	350
	066-105	392
26084, Acts 1949	065-137	203
26319, Acts 1949	065-49	69
	066-55	312
26460, Acts 1949	066-101	385
26614, Acts 1951	065-40	55
	066-71	338
26766, Acts 1951	065-38	51
26787, Acts 1951	065-32	44

CITATOR TO SESSION LAWS

Chapter, Year	Opinion	Page
26800, Acts 1951	066-89	366
27789, Acts 1951	066-101	385
27989, Acts 1953	066-13	238
28115, Acts 1953	066-89	366
28145, Acts 1953	065-38	51
28270, Acts 1953	065-113	167
29615, Acts 1955	065-38	51
29743, Acts 1955	065-19	26
29801, Acts 1955	065-66	94
	065-107	157
	066-101	385
	066-110	399
29838, Acts 1955	065-54	75
29868, Acts 1955	065-133	198
29965, Acts 1955	065-8	10
30107, Acts 1955	066-110	399
30250, Acts 1955	065-12	18
31028, Acts 1955	066-101	385
31065, Acts 1955	066-101	385
57-1, Acts 1957	065-38	51
	065-113	167
57-150, Acts 1957	065-41	56
57-295, Acts 1957	065-65	91
57-312, Acts 1957	066-21	256
57-353, Acts 1957	065-48	68
57-364, Acts 1957	065-107	157
57-913, Acts 1957	066-110	399
59-1, Acts 1959	065-38	51
59-181, Acts 1959	065-76	105
59-195, Acts 1959	066-101	385
59-205, Acts 1959	066-13	238
59-667, Acts 1959	066-83	355
59-959, Acts 1959	066-110	399
59-1599, Acts 1959	066-101	385
59-1652, Acts 1959	066-101	385
59-1656, Acts 1959	066-101	385
61-1, Acts 1961	065-38	51
61-119, Acts 1961	065-107	157
61-243, Acts 1961	065-133	198
61-275, Acts 1961	066-55	312
61-295, Acts 1961	065-98	139
61-378, Acts 1961	066-34	281
61-406, Acts 1961	066-106	394
61-460, Acts 1961	066-7	227
61-505, Acts 1961	066-60	319
61-691, Acts 1961	065-72	101
61-1313, Acts 1961	066-83	355
61-2590, Acts 1961	066-101	385
63-2, Acts 1963	065-38	51
63-40, Acts 1963	065-14	21
63-59, Acts 1963	065-100	144
63-175, Acts 1963	065-26	37
63-195, Acts 1963	065-60	83
63-247, Acts 1963	065-139	208
63-250, Acts 1963	065-83	115
	065-90	125
	066-71	338
63-271, Acts 1963	065-76	105
63-355, Acts 1963	065-41	56
63-376, Acts 1963	066-100	384
63-421, Acts 1963	066-75	345
63-508, Acts 1963	066-15	243
63-528, Acts 1963	066-6	224
	066-7	227
63-548, Acts 1963	065-3	3
63-550, Acts 1963	065-7	9
63-572, Acts 1963	065-141	214
63-659, Acts 1963	065-72	101
63-763, Acts 1963	065-32	44
63-843, Acts 1963	065-32	44
63-857, Acts 1963	065-32	44
63-858, Acts 1963	065-32	44
63-886, Acts 1963	066-110	399
63-1063, Acts 1963	065-32	44
63-1334, Acts 1963	065-63	88
63-1747, Acts 1963	066-101	385
65-1, Acts 1965	065-139	208
	066-71	338
65-36 Acts 1965	065-124	186
65-50, Acts 1965	066-58	316
65-60, Acts 1965	065-109	160
65-65, Acts 1965	066-28	272
65-135, Acts 1965	065-72	101
	065-84	117
	065-117	175
	065-122	183
	066-8	229
65-174, Acts 1965	065-80	112
65-175, Acts 1965	065-79	110
65-239, Acts 1965	065-138	207
	066-65	327
65-250, Acts 1965	065-59	82
65-258, Acts 1965	065-83	115
	065-90	125
	065-130	194
	066-70	337
	066-71	338
	066-79	350
	066-80	352
65-274, Acts 1965	066-49	303
65-296, Acts 1965	065-98	139
65-303, Acts 1965	066-11	234
65-323, Acts 1965	065-94	133
65-345, Acts 1965	066-57	315
65-346, Acts 1965	066-57	315
65-367, Acts 1965	065-84	117
	065-117	175
	066-8	229

CITATOR TO SESSION LAWS

Chapter, Year	Opinion	Page
65-367, Acts 1965 (cont.)	066-28	272
	066-92	370
65-369, Acts 1965	066-57	315
65-375, Acts 1965	066-35	283
65-389, Acts 1965	066-25	266
	066-48	302
65-391, Acts 1965	066-60	319
65-408, Acts 1965	065-119	180
65-424, Acts 1965	065-93	132
65-427, Acts 1965	065-109	160
	065-114	169
65-435, Acts 1965	065-78	109
65-446, Acts 1965	065-141	214
	066-6	224
	066-7	227
65-449, Acts 1965	065-67	95
65-457, Acts 1965	065-103	149
65-468, Acts 1965	065-94	133
65-479, Acts 1965	065-70	99
65-483, Acts 1965	066-15	243
65-487, Acts 1965	065-102	147
65-492, Acts 1965	065-111	163
	066-106	394
65-504, Acts 1965	066-37	286
65-526, Acts 1965	065-134	200
65-538, Acts 1965	066-28	272
65-547, Acts 1965	066-9	233
65-562, Acts 1965	065-91	129
65-684, Acts 1965	065-136	202
	066-3	219
65-887, Acts 1965	066-67	329
65-900, Acts 1965	066-22	259
65-917, Acts 1965	065-86	121
65-1564, Acts 1965	065-136	202
	066-3	219
65-1818, Acts 1965	065-132	197
65-1881, Acts 1965	066-83	355
65-2012, Acts 1965	066-101	385
65-2244, Acts 1965	066-91	369
65-2307, Acts 1965	066-101	385
65-2431, Acts 1965	066-95	375
65-2442, Acts 1965	066-28	272

REVISED STATUTES, 1892

Section	Opinion	Page
837	065-133	198

GENERAL STATUTES, 1906

Section	Opinion	Page
1189	065-133	198

REVISED GENERAL STATUTES, 1920

Section	Opinion	Page
1006	065-34	47
1425-1442	065-129	192
1647-1666	065-8	10
2297	065-133	198
5563	066-69	331

COMPILED GENERAL LAWS, 1927

Section	Opinion	Page
4540-4549	066-103	389
7749	066-69	331

CITATOR

OF

OMITTED OPINIONS TO FLORIDA STATUTES, LAWS OF FLORIDA AND STATE CONSTITUTION CONSTRUED OR CITED IN OPINIONS REPORTED IN 1965-1966.

FLORIDA STATUTES

Section	Opinion	Section	Opinion
122.02	066-87	237.11	065-35
129.02-129.04	065-35	237.15(3)	065-35
134.02	066-87	240.011	065-18
145.13	066-47	282.01(2)	065-121
193.03	065-35	282.01(6)(a)	065-121
193.32	065-35	282.011(7)	065-121
205.322	065-88	616.12	065-88
237.05	065-35	616.15	065-88
237.09	065-35		

CHAPTERS
FLORIDA STATUTES

Chapter	Opinion	Chapter	Opinion
121	066-87	145	066-47
122	066-87	237	065-35
129	065-35	240	065-18
134	066-87	616	065-88

STATE CONSTITUTION

Article	Opinion
III, §27	065-18
IX, §4	065-121
XII, §10	065-35

SESSION LAWS

Chapter, Year	Opinion	Chapter, Year	Opinion
19262, Acts 1939	065-121	65-135, Acts 1965	065-121
28647, Acts 1953	066-87	65-294, Acts 1965	065-121
63-204 Acts 1963	065-18	65-356, Acts 1965	066-47
63-250, Acts 1963	065-35	65-1225, Acts 1965	066-87
63-831, Acts 1963	066-47		